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SUPREME COURT OF THE UNITED STATES OF AMERICA Office-Supreme Court, U.S. F 1 L E D

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RALPH BOUMA and MRS. RALPH BOUMA

Petitioners

VS

LARRY C. IVERSON, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF MONTANA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

The following federal questions are presented for review by this petition for a writ of certiorari:

- 1. Did the Montana Courts violate due process of law when, among other things, the Buyers under a land exchange contract were not allowed to raise the defense of standing on the basis that the moving Stockholders had obtained their stock by a fraud as a defense to being bound by a prior state court decision in a civil action where they were not a party?
- 2. Did the Montana Courts violate due process of law when they refused to allow Ratification and Estoppel to be raised as defenses to an action to void a land exchange contract based upon agents acting without authority although such defenses were provided by Montana Statutes and case law?

- 3. Did the Trial Court violate due process of law when the Trial Judge was not disqualified for bias and prejudice?
- 4. Did the Montana Supreme Court violate due process of law when the members refused to disqualify themselves after being named in a civil rights action brought by the Buyers and receiving knowledge that they were named as potential defendants in an in camera verified application for a grand jury?
- 5. Did the Montana Supreme Court violate due process and equal protection of the laws then it required Ralph Bouma to be represented by an attorney at oral argument.
- 6. Did the Montana Supreme Court violate due process of law when it awarded \$500.00 in damages on appeal without any notice or opportun-

ity to be heard.

PARTIES TO THE ACTION

Ralph Bouma and Mrs. Ralph Bouma, Petitioners Larry C. Iverson, Inc., Respondent

TABLE OF CONTENTS

| | PAGE |
|---|------|
| Questions for Review | 1-4 |
| Parties to the Action | 4 |
| Opinions Below | 14 |
| Jurisdiction | 14 |
| Constitutional Provisions | 15 |
| Statement of the Case | 15 |
| Argument | |
| I. The Buyers were held bound by a prior court decision | 26 |
| which they were not parties. Their defense that the prior | |
| court decision was obtained by a fraud on the court was | |
| ignored by the Montana Courts. This violated due process of | |

| | PAGE |
|--|------|
| law because the buyers were not parties to the prior court | |
| action. | |
| II AnGuessen change in State Count sinil amounture | 31 |
| II. An unforeseen change in State Court civil procedure | 31 |
| denies the Buyers right to due process of law. | |
| III. The Montana Trial Court denied the Buyers right to | 35 |
| due process of law by refusing to remove Judge Leonard | |
| Langen from the case. | |
| IV. The Montana Supreme Court denied the Buyers right to | 40 |
| due process of law by acting upon bias and prejudice. | |

was made without notice or opportunity to be heard.

TABLE OF AUTHORITIES PAGE Audit Services, Inc. vs. Francis Tindall Const. 32 (Mt., 1979) 600 P.2d 811 35 Blizzard vs. Frechette (1st.Cir., 1979) 601 F.2d 1217 31 Bouie vs. Columbia (1964) 378 U.S. 347, 12 L.Ed. 2d 894, 84 S.Ct. 1697 31 Brinkerhoff - Farris Trust and Savings Co. vs. Hill, (1930) 281 U.S. 672, 74 L.Ed. 1107 50 S. Ct. 451 44 Campanella vs. Bouma (1967) 164 Mont. 217, 520 P.2d 1073 30 Carey vs. Piphus (1978) 435 U.S. 247, 55 L.Ed 2d 252, 98 S.Ct. 1042 43.47 Chandler vs. Fretag (1954) 348 U.S. 3, 99 L.Ed 2d 4 75 S.Ct.1

| | PAGE |
|--|-------|
| Channel Flying Co. vs. Bernhardt (Alaska, 1969) 451, P. 2d 570 | 35 |
| Coe Vs. Armour Fertilizer Works (1915) 237 U.S. 413, 59 L. Ed 1027, 35 S.Ct 625 | 26,27 |
| Country Club Tower Corp. vs. Tower Management (D. Mont., 1967) 275 F. Supp. 468 | 32 |
| Davis vs. Crouch (1876) 94 U.S. 514, 24 L. Ed 281 | 50 |
| Ex parte Strickler (D. Ky., 1901) 109 F. 145 | 49 |
| Farretta vs. California (1975) 422 U.S. 806, 45 L. Ed. 2d 562, 95 S.Ct. 2525 | 43 |
| Farmers State Bank of Conrad vs. Iverson (1973) 162 Mont. 130, 509 P. 2d 839 | 16 |
| Garrison vs. Lacey (10th Cir., 1966) 362 F. 2d 799 | 44 |
| | |

| 10 | PAGE |
|--|-------|
| Gibson vs. Erie-Lackawanna Railroad Co. (6th Cir., 1967) 378 F. 2d 476 | 38 |
| Groppi vs. Leslie (1972) 404 U.S. 496, 30 L. Ed. 2d 632, 92 S. Ct. 582 | 49,51 |
| Hansberry vs. Lee (1940) 311 U.S. 32, 85 L.Ed. 22 | 32,33 |
| Hoteling vs. Hoteling (Cal., 1924) 224 P. 455, 56 A.L.R 734 | 35,39 |
| Johnson vs. Mississippi (1971) 403 U.S. 212, 29 L. Ed. 2d 423, 91 S.Ct. 1778 | 43 |
| Kramer vs. Scientific Control Corporation (3 d Cir., 1976) 534 F. 2d 1085 | 30 |
| Lynch vs. Public Service Commission of Nevada (d. Nev., 1974) 376 F. Supp. 1033 | 44,47 |
| Miller vs. McCarthy | |

(9th Cir., 1979) 607 F. 2d 854

| | PAGE |
|--|----------|
| Morgan vs. United States (1936) 298 U.S. 468, 80 L. Ed. 1289 | 30 |
| Pink vs. A.A.A. Highway Express, Inc. (314 U.S. 201, 86 L. Ed. 152 | 1941) 27 |
| Reynolds vs. State of Georgia (5th Cir., 1981) 640 F. 2d 640 | 32 |
| Selway vs. Burns (Mt., 1967) 429 P. 2d 640 | 30 |
| Smith vs. Smith (Ariz. 1977) 564 P.2d 1266 | 39 |
| State vs. McElveen (Mt., 1979) 544 P. 2d 820 | 43 |
| State vs. Swan (Mt., 1982) 649, P, 2d 1297 | 43 |
| United States vs. Boe (8th Cir., 1974) 491 F. 2d 970 | 49 |

| - | - | - |
|---|----|---|
| э | .0 | п |
| | | A |
| | | |

| 12 | PAGE |
|---|-------|
| United States vs. Womack (5th Cir., 1972) 454 F. 2d 1337 | 35,36 |
| Wood vs. Love County (1920) 253 U.S. 17, 64 L.Ed. 751 | 31 |
| Worman Motor Co. vs. Hill (1939) 54 Ariz. 227, 94 P. 2d 865 | 33 |
| CONSTITUTIONAL PROVISIONS | |
| Section 1, Amendment 14, United States Constitution | 15 |
| STATUTES | |
| Title 28 U.S.C. Section 1257 (3) Section 1-3-211, Montana Code Annotated | 34 |
| Section 3-1-1001, et.seq. Montana Code Annotated | 42 |
| Section 28-2-304 Montana Code Annotated | 32 |
| Section 37-61-416 Montana Code Annotated | 46 |

| | 13 | PAGE |
|--|--------------|-----------------------|
| Section 46-11-37, Montana Code Annotated | | 37 |
| | RULES | |
| Rule 17.1(b) Revised Rules, Supreme Court of the Unit | ed States | 45 |
| Rule 17.1(c) Revised Rules, Supreme Court of the Unit | ed States | 27,40,42, 46,47,50 |
| Rule 34, Montana Rules of Appellate Civil Procedure | | 26 |
| | ENCYCLOPEDIA | |
| 3 C.J.S. Agency 398 | | 33 |

OPINIONS BELOW

The initial opinion of the Montana State District Court is unreported but attached as Appendix A. The decision of the Montana Supreme Court on the first appeal is reported at 639 P.2d 47 and attached as Appendix B. The Order of the Montana State District Court upon remand is unreported and attached as Appendix C. The Order of the Montana Supreme Court dismissing the second appeal is reported at 39 State Reporter 2125 and attached as Appendix D.

JURISDICTION

The Order the Montana Supreme Court was enterred on December 2, 1982 (Appendix D). A timely petition for Rehearing was denied on

December 16, 1982 (Appendix E). The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS

Section 1, Amendment 14 (in part): "(N)or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person with its jurisdiction the equal protection of the law."

STATEMENT OF THE CASE

Raph Bouma and Mrs. Ralph Bouma (hereafter referred to collectively

as the "Buyers") purchased a farm on a land exchange contract from Larry C. Iverson, Inc., (hereafter referred to as the "Corporation"). Subsequently, the Corporation became insolvent. Creditors of the Stockholders of the Corporation brought an action to foreclose on stock shares pledged as security on loans, Farmers State Bank of Conrad vs. Iverson (1973) 162 Mont. 130, 509 P.2d 839. Two years after the land exchange contract the Creditors were declared Stockholders of the Corporation in a civil action to appoint a Receiver and to force the Receiver to bring and action to rescind the Buyers contract, United Bank of Pueblo vs. Iverson and Farmers State Bank of Conrad vs. Iverson consolidated cases numbered 8221/8073 decided April 7, 1971 (9th Judicial District, State of Montana, Pondera County). The

decision in that case is attached as Appendix F. The Court appointed George Campanella as the Receiver (hereafter referred to as the "Receiver").

The Receivers brought this civil action against the Buyers to void the land exchange contract. The basis of the action was that the Buyers misrepresented the value of the property and the agents of the Corporation acted outside of their authority. The Buyers alledged numberous defenses. The defenses relevant to this appeal are: (1) The Receiver lacked standing because he was appointed by a fraud on the court in that (A) the allegation that the Bouma contract had an inequitable price was unprovable; (B) Creditors obtained their stock shares by fraud; (C) the defendants in 8221/8073 didnot have a meaning-

ful opportunity to be heard; (2) Ratification; (3) Estopppel.

These defenses were raised in the Irial Court and in the Supreme Court. The Standing of the Receiver was challenged in the Answer of Ralph Bouma at Defenses 10 through 20; Answer of Mrs. Ralph Bouma at Defenses 10 through 15; Appellant Boumas' Brief and Answer to Brief of Larry C. Iverson, Inc., Cross-Appellant at 66; Appellant Boumas' Reply and Rebuttal brief to Answer and Reply brief of Larry C. Iverson, Inc., Cross Appellant and Respondent at 25; Appellant's Brief at vii. Specifically, fraud was argued as a basis for challenging the standing in the Answer of Ralph Bouma at Defense Number 11; Answer of Mrs. Ralph Bouma at Defenses 10 through 15; Defendant Boumas' Motion for Summary Judgment on Plaintiff's Complaint; Appellant Boumas' Brief and Answer to Brief of Larry C. Iverson Inc.,

Cross-Appellant, at 10-11 and 66. Appellant Boumas' Reply and Rebuttal Brief to Answer and Reply Brief of Larry C. Iverson, Inc., Cross-Appellant and Respondent; Appellants' Brief P.vii. Lack of a meaningful trial in the appointment of a Receiver was argued as a basis of challenging the Receiver's standing in the Supplemental Answer at the 28th Defense, Answer of Ralph Bouma at Defense 11; Appellant Boumas' Brief and Answer to Brief of Larry C. Iverson, Inc., Cross-Appellant and Respondent at 25. Ratification and Estoppel were raised as defenses at Answer of Ralph Bouma at the 18th Defense, Appellant Boumas' Brief and Answer to Brief o Larry C. Iverson, Inc., Cross-Appellant at 66; Appellant Boumas Reply and Rebuttal Brief of Larry C. Iverson, Inc., Cross-Appellant and Respondent at 59-64; Appellant's Brief at 3-4; Appellants' Reply Brief at 5.

Before judgment, the Receiver asked the Court's permission to abandon the lawsuit because, among other reasons, the contract value was fair. Instead, the Trial Court substituted a "partially reconstituted corporation" for the Receiver. The Corporation moved for summary judgment.

The Trial Court granted the Corporation's motion for summary judgment It was done on the narrow grounds that the Corporation's agents acted beyond their authority in selling the farm. The authority provided in the by-laws was held invalid because the Corporation failed to publicly file the by-laws. The Trial Court ordered: (1) the Buyers return the Farm to the Corporation; (2) the Buyers account for rents and profits for the 13 years of possession with interest at the legal rate; (3) The Corporation credit the Buyers the amount it received in 1968 for the land taken in exchange without regard to current market value, rents or

profits or costs of re-entering the cattle business. This resulted in an unrefuted net loss to the Buyers of \$1,400,000.00. The Trial Court held that the Buyers defenses were moot (Appendix G, P2A). Both parties appealed.

Ralph Bouma went to the oral arguemnt in his case prepared to argue his case, Pro Se. Only moments before the argument the was to begin the Montana Supreme Court informed him that he would not be allowed to argue his case. His wife's attorney would be required to do so.

No record of Montana Supreme Court proceedings are kert. Objection to this procedure was raised in the Petition for Rehearing-Memorandum at 52; Appellant's Brief at 8; Appellants Reply Brief at 7 to 10. The two opinions of the Montana Supreme Court ignored this

objection (Appendix B; Appendix D).

The Montana Supreme Court affirmed the judgment in part and modiffied it in part. It bound the Buyers by the findings of fact and conclusions of law of Consolidated Cause Numbered 8221/8073 and did not allow the Buyers to challenge that decision based upon fraud and lack of a meaningful hearing. It held the land exchange contract void on the theory that the agents acted without authority. It held as a matter of law that Ratification and Estoppel could not be raised as defenses. The Court modified the accounting and returned the case to the trial court.

The Corporation moved the District Court for an order transfering possession of the farm to the Receiver. Before this hearing Ralph Bouma filed an Affidavit for Disqualification for Cause to disqualify

Judge Leonard Langen, the presiding judge. Chief Justice Haswell assigned Mark Sullivan to hold a hearing. Judge Langen was given notice but did not appear.

At the disqualification hearing Ralph Bouma presented testimony in support of the affidavit. Date Kiel, an attorney from Conrad, Montana, testified that Judge R.D. McPhillips stated that McPhillips would assign judge prejudiced against the Buyers. Judge McPhillips was the original trial judge and the judge who assigned Judge Langen to the case. Judge Langen summarily disposed of a number of the Buyer's defenses. Judge Langen acted as if he were counsel for the Corporation at times. Finally, Judge Sullivan refused to allow Keil to testify about Judge McPhillips's prejudice.

Henry T. Murray, an appraiser for 35 years, testified at the hear-

ing. He had been re-empoyed by the Receiver. He said that he observed Judge Langen in this case. Murray said that he had never seen a judge more prejudiced.

In addition, the Buyers agrued that Langen had prejudiced members of the Montana Supreme Court. He did so by filing an affidavit of Ralph The Affidavit was presented by Bouma for the purpose of an in camera application for initiating a grand jury investigation (Docket Number 474). The affidavit alleged that five justices of the Montana Supreme Court committed certain crimes. They Buyers asked that the application and affidavit not be made public (Memorandum in Lieu of Transcript of Hearing Relating to Application for Order Summoning a Grand Jury Held September 25, 1979, This Affidavit was later argued by the Corporation as a reason to affirm Judge Langen's summary judgment.

Judge Sullivan refused to remove Judge Langen as the presiding judge (Appendix H). The Hearing on the Corporation's motion for possesion of the farm was held. The Court ordered the farm transferred and modified the accounting (Appendix C). From the order, the Buyers appealed.

On Appeal, Ralph Bouma asked all seven justices who participated in the first decision to disqualify themselves (Motion for Disqualification for Cause, Appendix I; Affidavit for Disqualification for Cause, Appendix J). This motion was denied (Order, Appendix K).

Briefs were filed by both parties. The Montana Supreme Court dismissed the appeal. It awarded \$500.00 in damages on appeal to the Corporation. The Buyers had no notice or oppurtunity to be heard on

the issue of damages on appeal. This is because the Corporation did not ask for such relief. Nor did the Montana Supreme Court give notice to the Buyers that it was considering such relief. On Rehearing, the Buyers asked the Court to reconsider this issue along with all the other issues (Petition for Rehearing Pursuant to Rule 34, Montana Rules of Appellate Civil Procedure, Appendix L). The Petition for a Rehearing was denied without opinion(Appendix E).

ARGUMENT

I. THE BUYERS WERE HELD BOUND BY A PRIOR COURT DECISION TO WHICH THEY WERE NOT PARTIES. THEIR DEFENSE THAT THE PRIOR COURT DECISION WAS OBTAINED BY A FRAUD ON THE COURT WAS IGNORED BY THE MONTANA COURTS. THIS VIOLTATED DUE PROCESS OF LAW BECAUSE THE BUYERS WERE NOT PARTIES TO THE PRIOR COURT ACTION.

A person not a party to a prior court action may allege Fraud as a defense to being bound by the prior court action, Coe vs. Armour

Fertilizer Works (1915) 237 U.S. 413, 59 L. Ed 1027, 35 S. Ct. 625;

Hansberry vs. Lee (1940) 311 U.S. 32, 85 L. Ed. 22; Pink vs. A.A.A.

Highway Express (1941) 314 U.S. 201, 86 L.Ed 152. The refusal by a state court to allow the person to defend on the grounds violates due process, Coe. Further, a state court which refuses to allow fraud to be raised decides a federal question in conflict with the above decisions, Rule 17.1(c), Revised Rules, Supreme Court of the United States.

The present action was initiated by a Receiver. The Receiver was appointed in a civil action (Consolidated Cause Numbered 8221/8073). Further, the Court concluded that United Bank of Pueblo and Farmers State Bank of Conrad were stockholders in Iverson, Inc. The Buyers

were not parties to that action.

The Receiver brought this action against the Buyers to void the contract for deed. The Buyers, as a defense, alleged fraud on the Court in 8221/8073. Specifically, the Buyers challenged the appointment of the Receiver. The basis of the challenge was theat the Plaintiffs in 8221/8073. Specifically, the Buyers challenged the appointment of the Receiver. The basis of the challenge was that the Plaintiffs in 8221/8073 who petitioned for the Receiver's appoinment obtained their stock by fraud on the court. The Receiver alleged inadequate consideration in the Buyers land exchange contract as the primary equitable basis for recision. The Buyers alleged that the Receiver joined in the fraud of the Plaintiffs in 8221/8073 because there was adequate consideration. As proof, the Buyers relied on the Receiver's own statement that an inequitable disparity in the purchase price was unprovable (Receiver's Statement to the Court of December 22, 1977, Appendix M).

Also, the decision in 8221/8073 found the Plaintiffs to be Stockholders. The Buyers were bound by this decision, also. They claimed this decision was made by a fraud on the Court. This was because the Defendants in 8221/8073 case were given only 2½ hours to present their case. This was shown in the Deposition of Judge Robert S. Keller, (Appendix N, P.271,272, 290)

KELLER: Mr. Treadaway, how long do you think it will take for presentation of your defense?

TREADAWAY: Well, the Plaintiff has taken 2½ weeks to present their case and I anticipate that it will take us about the same length of time to put on our defense.

KELLER: Mr. Treadaway, you may be sitting in this for the next 2½ weeks, but I certainly am not going to be here. In fact, I have checked out of the motel and I will be on my way to

Kalispell at 5 o'clock this afternoon. (This Discussion took place at about 2:30 P.M.)

The defendants were not allowed to present their full defense.

If a meaningful defense was allowed, the Creditors would not have been declared Stockholders.

Fraud upon the court is to deny a party his day in court, <u>Selway vs. Burns</u> (Mont., 1967) 429 P.2d 640. In this case, the Defendants who stood in the Buyers place had an inadequate opportunity to present their case, <u>Carey vs. Piphus</u> (1978) 435 U.S. 247, 55 L.Ed. 2d 252, 98 S. Ct. 1042; <u>Morgan vs. United States</u> (1936) 298 U.S. 468, 80 L.Ed 1289; <u>Lynch vs. Public Service Commission of Nevada</u> (D. Nev. 1974) 376 F. Supp. 1033. The refusal of the Montana Supreme Court to consider this defense of fraud upon the Court violated the above United State Supreme Court decisions on due process. It makes the Montana Supreme Court's

descision reviewable on a writ of certiorari, Rule 17.1(c) Revised Rules, Supreme Court of the United States.

In summary, fraud was alleged as a defense to the Buyers being bound by a prior state cour decision. It was disregarded by the Montana Court. Fraud may be raised as a defense to being bound by a prior court decision. To refuse to do so violated United States Supreme Court decisions on due process.

II. AN UNFORESEEN CHANGE IN STATE COURT CIVIL PROCEDURE DENIES THE BUYERS RIGHT TO DUE PROCESS OF LAW.

An unforeseen change in state civil procedure which denies a party the right to be heard denies due process of law. Brinkerhoff-Farris

Trust and Savings Co. vs. Hill (1930) 281 U.S. 672, 74 .Ed. 1107,

50 S.Ct. 451; Bouie vs. Columbia (1964) 378 U.S. 347, 12 L.ED 2d

894, 84 S.Ct 1967; Ward vs. Love County (1920) 253 U.S. 17, 64 L.Ed

751; Robinson vs. Ariyoshi (D. Hawaii, 1977) 441 F. Supp. 559. Such a denial of due process is reviewable by writ of certiorari, Reynolds vs. State of Georgia (5th Cir., 1981) 640 F. 2d 702; Country Club Tower Corp. vs. Tower Management (D. Mont., 1967) 275 F. Supp. 468.

In this case, the Buyers raised Ratification and Estoppel as defenses. In 1979, the Montana Supreme Court recognized Ratification as a defense to action brought to void unauthorized acts of an agent.

Audit Services, Inc., vs. Francis Tindall Const. (Mont. 1979) 600 P.2d 811, 813, also Section 28-2-304, Montana Code Annotated. In this case, the Montana Supreme Court reversed itself without explanation. It held that contracts enterred into without authority may not be ratified, Iverson vs. Bouma (Mt. 1982) 639 P.2d 49, 60.

In Justice Daly's opinion, <u>Hoteling vs. Hoteling</u> (Cal., 1924)
224 P. 455, 56 A.L.R. 734 was cited in support of the rule that agents

may not act beyond their authority. Yet, in <u>Hoteling</u> the California Supreme Court allowed ratification to be raised as a defense, 224 P. at 459. It ruled that the facts did not prove the defense of ratification.

Also, the Court cited <u>Worman Motor Co. vs. Hill</u> (1939) 54 Ariz. 227, 94 P. 2d 865 for the rule that persons without authority lack capacity to contract. In <u>Worman Motor</u>, a minor brought an action to declare a contract void which was signed when the Plaintiff was under the age of majoirty. The Arizona Supreme Court says that such a contract may be valid if the minor keeps what he purchased essentially ratifying the contract.

Further, Estoppel is a defense to an action based upon agents acting without authority, 3 C.J.S. Agency Section 398. Yet, the

Montana Supreme Court siad that Estoppel may not be raised in such an action as a matter of law.

Further, the basis of voiding the land exchange contract was that the corporate by-laws had not been filed by the Corporation. This was a failure of the Corporation to act; not the Buyers. Montana law states, "No one should suffer for the acts of anohter," Section 1-3-211, M.C.A.

The elimination of Ratification and Estoppel as defenses is an unforeseen change in state procedure. It violated the due process clause for the Montana Supreme Court to do so. Whether the elimination of two defenses in this violates due process is an important federal question, Rule 17.1, Revised Rules, Supreme Court of the United States. The United States Supreme Court should grant cert-

iorari.

III. THE MONTANA TRIAL COURT DENIED THE BUYERS' RIGHT TO DUE PROCESS OF LAW BY REFUSING TO REMOVE JUDGE LEONARD LANGEN FROM FROM THE CASE.

The right to due process of law is guaranteed under the 14th Amdendment to the United States Constitution. Included in the right to due process is the right to a fair and impartial tribunal, <u>Johnson vs. Mississippi</u> (1971) 403 U.S. 212, 29 L. Ed 2d 423, 91 S.Ct. 1778, Channel Flying Co. vs. Bernhardt (Alaska, 1969) 451 P.2d 570. The facts in this case show that the Buyers were denied that right.

Prior judicial involvement may provide a factual basis for doubting a judge's impartiality, <u>Blizard vs. Frechette</u> (1st Cir., 1979)601 F. 2d 1217, <u>United States vs. Womack</u>, (5th Cir., 1972) 454 F.2d 1337

24 A.L.R. Fed. 276. In <u>Womack</u>, a Federal District Judge's remarks and actions during judicial proceedings showed personal bias. The Defendant filed an affidavit of disqualification which was denied. The Court of Appeals reversed the decision and ordered a new trial.

In this case, Judge Langen's bias was shown. First, he was assigned the case by Judge R.D. McPhillips. The uncontroverted evidence shows that Judge McPhillips was in a position to manipulate the case by the appointment of a presiding judge. McPhillips wanted the presiding judge to associate the Buyers with John C. Treadaway and J. Milton Krull.

Second, the uncontroverted evidence shows that Judge Langen summarily disposed of a number of the Buyers defenses. Third, it

shows that Judge Langen appeared prejudiced against the buyers.

Fourth, Ralph Bouma presented in camera an affidavit. That affidavit was for the sole purpose of initiating a criminal investigation. It accused five Justices of the Montana Supreme Court of Judge Langen said that he had no jurisdiction to hear the application for the impaneling of a grand jury. His reasoning was that he was only assigned to a civil case; the affidavit involved a criminal matter. Bouma argued that the affidavit should not be included in this civil action file so that the Supreme Court would not be prejudiced Yet, Judge Langen ordered it filed in the civil action file despite the fact that such proceedings are secret, Section 46-11-317, Montana Code Annotated.

Fifth, Judge Langen's summary substitution of a "partially reconstituted Corporation" for the Receiver shows his bias against the Buyers. The Receiver petitioned to abandon this civil action. Then, Judge Langen created a new legal entity, a "Partially reconstituted Corporation" to take its place. Prior to this case, there was no such entity in Montana Law.

Sixth, if a judge acts as he is counsel for one party, then the other party's right to due process was violated, <u>Gibson v. Erie</u>

<u>Lackawanna Railroad Co.</u> (6th Cir., 1967) 378 F. 2d 476. Judge

Langen's remarks were more consistent with those of an attorney for the Corporation than as presiding judge.

Seventh, if a judge is a defendant in a civil rights action brought by a party to a law suit, then that judge may not sit on the case, <u>Johnson</u>. In this case, Judge Langen was a defendant in a civil right action brought by the Buyers. He cannot sit as the Judge.

The Corporation cited Smith vs. Smith (Ariz., 1977) 564, P.2d 1266 for the rule that if a party brings the action against the judge solely to disqualify the judge, then the party may not disqualify the judge. In this case, there was no connection between the Buyers civil rights action and the disqualification proceedings. The Civil Rights Action was for injuctive relief against the judgment entered by Judge Langen on the basis that Judge Langen had violated the Buyers Civil Rights.

Eighth, Judge Langen's bias continued to show in the proceeding following the disqualification hearing. On January 19, 1982, the

Corporation filed a motion and notice of hearing to deliver possession of the farm to the Receiver. The hearing was set for February 26, 1982. Immediately prior to that hearing and without notice to the Buyers the Court substituted the Corporation for the Receiver to get possession of the farm.

The Montana Trial Court violated the Buyers right to due process of law when it denied the Buyers motion to diqualify Judge Langen.

This is an important federal question which has not been decided,

Rule 17.1(c), Revised Rules, Supreme Court of the United States. The

United States Supreme Court should grant a writ of Certiorari on this basis.

IV. THE MONTANA SUPREME COURT DENIED THE BUYERS RIGHT TO DUE PROCESS OF LAW BY ACTING UPON BIAS AND PREJUDICE.

In Johnson, the United States Supreme Court held that a State

Judge violated a party's right to due process by failing to excuse himself. The State Judge was a Defendant in a civil rights action brought by the party. The United States Supreme Court said that the State Judge was so "enmeshed" in matters regarding the party that it violated due process for the State Judge to decide the matter.

In this case, five of the seven Justices were named in a civil action by the Buyers, 639 P.2d at 53. Also, they were named as possible defendants in an affidavit requesting the impaneling of a grand jury. This affidavit was used at oral argument by the Corporation over the objection of the Buyers to emotionalize and incense the Montana Supreme Court. The Justices were too enmeshed in this case to be unbiased, Johnson.

The Corporation argued that if the Montana Supreme Court cannot act in this case because of its bias, then no decision may be rendered. The Montana Supreme Court could have resolved this by having substitute justices appointed by the Judicial Nominating Commission, Section 3-1-1001, et.seq., Montana Code Annotated. This was suggested by Ralph Bouma.

The question of whether a State Supreme Court is so enmeshed with a party that it cannot decide a case had not been decided by the United States Supreme Court. It is an improtant federal question under Rule 17.1(c), Revised Rules, Supreme Court of the United States. The petition for a writ of certiorari should be granted on this basis.

V. THE MONTANA SUPREME COURT REFUSED TO ALLOW RALPH BOUMA TO ORALLY ARGUE HIS CASE, PRO SE. THIS VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLUASES OF THE UNITED STATES CONSTITUTION.

A party to a legal action has to constitutional right to represent himself, Faretta vs. California (1975) 422 U.S. 806, 45 L. Ed 2d 562, 95 S. Ct. 2525. The refusal of a court to allow a person to represent himself violated due process, Kramer vs. Scientific Control Corporation (3rd Cir., 1976) 534 F. 2d 1085. Further, the right to counsel includes a reasonable opportunity to consult with counsel, Chandler vs. Fretag (1954) 348 U.S. 3,99 L.Ed. 2d 4, 75 S.Ct. 1; see State vs. Swan (Mt. 1982) 649 P. 3d 1297; State vs. McElveen (Mt., 1979) 544 P.2d 820.

In this case, Ralph Bouma had represented himself, Pro Se, through

out the litigation. He appeared at the oral argument before the Montana Supreme Court prepared to argue his case. He had been instructed to do so in Campanellavs. Bouma (1967) 164 Mont. 217, 520 P. 2d 1073. Moments before the argument, he was told by the Montana Supreme Court that he would not be allowed to argue. His wife's attorney would argue his case for him. This procedure violated due process of law for several reasons.

First, a party has a right to represent himself, <u>Faretta</u>
Although Faretta is a criminal case, the federal circuit courts are extending this to civil actions as well, <u>Kramer</u>, <u>Gerrison vs. Lacey</u> (10th Cir., 1966) 362 F. 2d 799; see <u>Miller vs. McCarthy</u> (9th Cir., 1979) 607 F. 2d 854.

To the Petitioners'knowledge, only in Montana is the right to represent oneself in a civil action limited. The Montana Supreme Court has decided a federal question in conflict with several federal courts of appeal, Rule 17.1(b), Revised Rules, Supreme Court of the United States. The federal question is whither a person has the right to represent himself in a civil action. The United States Circuit Courts of Appeal of the Third, Ninth and Tenth Circuits have said a person does have the right. The Montana Supreme Court has said the person does not.

Second, the Montana Supreme Court denied Ralph Bouma's right to effective assistance of counsel. This was done by notifying his only moments before argument that his wife's attorney would be required to

argue his case. Ralph Bouma was prepared to argue his case. To guarantee effective assistance of counsel, a reasonable time to prepare must be given, <u>Chandler</u>. The denial of adequate preparation time in a civil case is an important question of federal law not settled by the United States Supreme Court, Rule 17.1(c), Revised Rules, Supreme Court of the United States.

Third, to deny Ralph Bouma the right to oral argument but allow the corporation oral argument denies equal protection of the law. In Montana, a person has the right to represent himself, Section 37-61-416, Montana Code Annotated. Equal protection of the law would guarantee that a person representing himself has the same rights as a person represented by an attorney, see <u>Miller</u>. In this case, Ralph Bouma was denied the right to oral argument before the Montana Supreme Court.

His opponent, The Corporation, was allowed the right to oral argument. This violates the equal protection of the laws.

Whether a party who represents himself may be denied oral argument on appeal which is given to the opposing party because he is represented by an attorney is an important question of federal law, Rule 17.1(c), Revised Rules, Supreme Court of the United States. It has not been settled by the United States Supreme Court. It should be settled by granting this writ of certiorari.

In summary, Ralph Bouma was denied the right to represent himself at oral argument on appeal. The manner in which this was done violated his right to effective assistance of counsel on appeal. Also, it denied him equal protection of the laws by denying him oral argument and allowing the opposing party oral argument. All of these decisions are in

conflict with a decision of a federal circuit court or are important, unsettled federal question.

VI. THE BUYERS WERE ORDERED TO PAY DAMAGES ON APPEAL TO THE CORPORATION IN THE AMOUNT OF \$500.00. THIS ORDER WAS MADE WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD.

The State may not take a peron's property without due process of law. Due process of law includes some notice and opportunity to be heard, Groppi vs. Leslie (1972) 404, U.S. 496, 30 L.Ed. 2d 632, 92 S.Ct. 582; United States vs. Boe (8th Cir., 1974) 491 F.2d 970; Ex Parte Strickler (D. Ky., 1901) 109 F. 145.

In this case, the Corporation did not ask for damages on appeal.

The Montana Supreme Court did not notify the Buyers that the Court
was considering imposing damages on appeal. The Montana Supreme Court
awarded the damages without any notice or oppurtunity to be heard.

The awarding of damages on appeal without notice or hearing may

be distinguished form <u>Groppi</u>. In <u>Groppi</u>, a person was fined and jailed for contempt without any notice or hearing. There was no contempt finding in the present case. But as a practical matter, there is no difference between a fine for contempt and an order to pay damages. The person still suffers a loss of property without notice or hearing.

The Montana Supreme Court held that the second appeal was frivolous. For this reason, the \$500.00 damages were awarded. If the Buyers had been given a chance they would have shown the second appeal was not frivolous. They could have shown that the decision on the first appeal was not final under Title 28 U.S.C. Section 1257. The decision on the first appeal was not final because the trial court's decision was modified in part, Davis vs. Crouch (1876) 94 U.S. 514, 24 L.Ed. 281. Since

the first decision was not final, an appeal of the trial court' second order was necessary for a petition for a writ of certiorari to be filed.

This deprivation of property without due process is an important federal question undecided by the United States Supreme Court or in conflict with the <u>Groppi</u> decision. Under Rule 17.1(c), Revised Rules, Supreme Court of the United States, the United States Supreme Court should grant the petition for a writ of certiorari.

CONCLUSION

The Buyers under the contract for deed were denied due process and equal protection of the laws for the reasons stated above. The United States Supreme Court should grant a writ of certiorari and review this cause. Upon review of the cause, the Court should order a jury trial to be held.

Dated this Synday of march, 1983.

ISTRALPH BOUMA Ralph Bouma Attorney Pro Se P.O. Box 220 Choteau, Mt. 59422

15/16HN ALBRECHT

John Albrecht Attorney for Mrs. Ralph Bouma P.O. Box 193 Choteau, Mt. 59422

CERTIFICATE OF MAILING

We certify that on this May of May of, 1983, that three copies of the petition for a writ of certiorari and all volumes of the Appendix were mailed, postage pre-paid to:

Ray Koby Swanber, Koby, Swanberg and Matteucci P.O. Box 2567 Great Falls, Montana 59401

Cresap S. McCracken Church, Harris, Johnson and Williams P.O. Box 1645 Great Falls, Montana 59403

Dated this & day of manch, 1983.

John Albrecht

15/ KARA BOUMA

Ralph Bouma

82-1625

NUMBER A863

SUPREME COURT OF THE UNITED STATES OF AMERICA Office-Supreme Court, U.S.
F 1 L E D

MAR 9 1983

ALEXANDER L STEVAS,

RALPH BOUMA and MRS. RALPH BOUMA

Petitioners

ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF

MONTANA

VS

LARRY C. IVERSON, INC.,

Respondent

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

VOLUME I

RALPH BOUMA Attorney Pro Se P.O. Box 220 Choteau, Mt. 59422 Tel:(406) 466-5374 JOHN ALBRECHT
Attorney for Mrs. Ralph Bouma
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Choteau, Mt. 59422
Tel: (406) 466-2621

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SUPREME COURT OF THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS VOLUME I

| ITEM | PAGE |
|--|------|
| Appendix A - Summary Judgment for Plaintiff | 1 |
| Appendix B - Iverson vs. Bouma (Mt., 1981) 639 P.2d 47 | 28 |
| Appendix C - Order | 95 |
| Appendix D - Opinion and Order Dismissing Appeal | 102 |
| Appendix E - Order | 107 |
| VOLUME II | |
| Appendix F - Findings of Fact, Conclusion of Law and Order in consolidated cases Numbered 8221/8073 | 109 |
| VOLUME III | |
| Appendix G - Memorandum in Lieu of Transcript of Hearing Held September 25, 1979 | 201 |

TABLE OF CONTENTS VOLUME III

| ITEM | PAGE |
|---|------|
| Appendix H - Order | 234 |
| Appendix I - Motion for Disqualification for Cause | 238 |
| Appendix J - Affidavit for Disqualfication for Cause | 240 |
| Appendix K - Order | 248 |
| Appendix L - Petition for Rehearing Pursuant to Rule 34, Montana Rules of Appellate Civil Procedure | 250 |
| Appendix M - Receiver's Statement to the Court (In Part) | 257 |
| Appendix N - Excerpt from Deposition of Robert Keller | 268 |

APPENDIX A

| IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PONDERA | |
|---|----------------------|
| LARRY C. IVERSON, INC.,1/ |) |
| Plaintiff, |) CAUSE NO. 8509 |
| vs. |) |
| RALPH BOUMA, Mrs. RALPH BOUMA, his wife | SUMMARY JUDGMENT FOR |
| CENTRAL BANK OF MONTANA, a Montana Corporation, M. DEAN JELLISON, DOUGLAS L. |) PLAINTIFF |
| PEACOCK, JACK M. PITZER, GREAT WESTERN BANK AND TRUST COMPANY, an Arizona banking |) |
| corporation and successor in interest to Pioneer Bank of Arizona, JOE GLENN, LYNN BARTLETT, and TOM DOWLING |) |
| |) |
| Defendants. | |

On September 25, 1979 the court orally delivered its opinion fropn the bench in proceedings in the above entitled cause, granting plaintiff's motion for summary judgment therein. The "Memorandum in Lieu of Transcript of Hearing Held September 25, 1979" reciting this court's opinion and order is now on file with the clerk of court, with copies mailed to counsel and Mr. Bouma, and is by this reference, incorporated herein.

By reason of the matters and things set forth herein and in the court's memorandum incorporated herein, IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

^{1/} Plaintiff wa originally named "George Campanella, as Receiver for the Use and Benefit of Larry C. Iverson, Inc." Amendment of the caption of the cause was authorized by order entered September 25, 1979.

- 1. There is no genuine issue as to any material fact with respect to the legal issues to which the plaintiff's motion for summary judgment is directed.
- 2. Plaintiff's motion for summary judgment is granted for the reasons set forth herein and in the court's memorandum, incorporated herein.
- 3. The purported "contract' described in plaintiff's complaint, between Larry C. Iverson, Inc. as seller and Ralph Bouma as purchaser, consisting of a contract for deed dated July 17, 1968, an agreement dated July 17, 1968 and an agreement dated July 16, 1968, copies of which are annexed to the answer of Mrs. Ralph Bouma as Exhibits A, B and C thereof, are null, void, of no force or effect whatever, and have been so ab initio. The "contract never had a legal existence.
- 4. As judicially admitted in the Ralph Bouma answer on file, Ralph Bouma was aware of facts which should have put a reasonable pruchaser on

inquiry and the court finds therefore that Ralph Bouma knew or should have known that the "contract" he made was not a bonafide corporate obligation, lawfully and properly entered into by persons authorized to do so.

- 5. That plaintiff is entitled to and is hereby granted and allowed the following:
 - a. Exclusive possession of the property described in the "contract" hereinabove referred to, as follows:

Pondera County, Montana, Township 28 North, Range 2 East M.P.M. Section 2: W\(\frac{1}{2}\), Section 11: All, Section 15: All, Section 20: SE\(\frac{1}{2}\), Section 21: All, Section 22: All, Section 26: E\(\frac{1}{2}\), Section 27: NW\(\frac{1}{2}\), NW\(\frac{1}{2}\)Section 28: W\(\frac{1}{2}\), Section 29: E\(\frac{1}{2}\).

Toole County, Montana, Township 29 North, Range 2 East M.P.M. Section 34: SE%, Section 35: SW%.

- b. A full, fair accounting by defendant Ralph Bouma of all money, things of value, revenue, rents, issues and profits derived from possession of the above descrived property from and after July 17, 1968, including any use as a base for any non-farm business operation.
- c. Judgment against defendant Ralph Bouma for all sums due plaintiff for the amounts accounted for with lawful interest on eact of said amounts from the time plaintiff became entitled to the same to the date the court aproves the accounting and allows credits against the same for such legitimate offsets as defend-Ralph Bouma may be able to substantiate.
- 6. Defendant is ordered to deliver possession of the premises described in paragraph 5.a. hereof upon plaintiff's demand. The clerk

of this court shall issue an order to the sheriff in the nature of execution to aid plaintiff's recovery of possession as provided by Rule 70, Montana Rules of Civil Procedure.

- 7. Defendant Ralph Bouma shall file the accounting hereinabove ordered in full detail with supporting documents respecting the credits he wishes the court to consider an his claim for any other credits which be believes he is entitled to receive, on or before the 21st day of January, 1980, a full copy shall be served on each of plaintiff's counsel at the same date. Plaintiff may have 45 days after serving and filing such accounting within which to file exceptions thereto, unless investigative discovery is required, in which case the time shall be extended, upon application to the Judge in Chambers.
 - 8. This court will hear any controversy as to the accounting at

10:00 a.m. the 25th day of March, 1980, at its courtroom in Pondera County. Any briefs to be filed by any party so moved shall be served upon opposing counsel or party not later than the 17th day of March, 1980. Copies of any such briefs shall be furnished to the presiding Judge at his chambers in Glasgow at the same time.

9. Funds in the hands of Central Bank of Montana as escrow agent on the contract herein declared void shall remain on deposit with said bank until futher order of the court respecting distribution thereof.

DATED this 29th day of November, 1979.

/s/ Leonard H. Langen
DISTRICT JUDGE PRESIDING

| JUDICIAL DISTRICT COUR MONTANA, IN AND FOR * * * * * * * * * | THE STATE OF | | * | |
|--|-------------------------|-----------------|--------------------------|--|
| LARRY C. IVERSON, IN | c., | |) | |
| | Plaintiff | |) | NO. 8509 |
| vs | | |) | FINDINGS OF FACT, CON- CLUSION OF LAW, JUDGMENT |
| RALPH BOUMA and MRS. RALPH BOUMA, et al., | |) | AND DECREE ON ACCOUNTING | |
| et al., | | |) | |
| | Defendants | | | |
| als als als als als als als als als | als als als als als als | ala ala ala ala | ala ala ala | to the |

Hearing on the accounting of defendant Ralph Bouma heretofore ordered and plaintiff's exceptions to said account came on regularly before the court, sitting without a jury, commencing at 9:00 a.m. on May 12, 1980. Preliminary matters disposed of in advance of hearing the accounting, were as follows:

The motion of defendants Ralph Bouma and Mrs. Ralph Bouma for an order dismissing the action and/or denying affirmative equitable relief (Document 577 filed May 7, 1980) was denied by the court.

The motion of George Campanella, Receiver of Larry C. Iverson, Inc. to quash the subpoena duces tecum served on him in behalf of the defendants was considered, the Receiver appearing personally in response to said subpoena and being represented by Warren C. Wenz, attorney for the Receiver. The court took the Motion to Quash under advisement. The Receiver remained available at the courthouse in response to the subpoena.

Appearances for the parties in the proceedings were as follows:

CRESAP McCRACKEN, Attorney for the Plaintiff RAY F. KOBY, Attorney
for the Plaintiff, RALPH BOUMA, Appearing as Attorney Pro Se, GALE
GUSTAFSON, Attoreny for Mrs. Ralph Bouma, LYNN J. LUND, Attorney
for Mrs. Ralph Bouma, RONALD J. GREENHAGH, Attorney for Mrs. Ralph

Bouma.

With respect to the accounting and exceptions thereto, witnesses were called and testified, exhibits offered and received. The Court having seen heard, understood and considered the law and the evidence adduced and being fully informed, now finds, concludes, determines and decrees as follows:

- 1. The court hereby affirms all bench rulings made respecting offers of proof and declines to receive such proof including all written offers filed herein, subsequent to May 13, 1980; the court hereby adopts and by this reference incorporates herein the following:
 - A. The Court's Memorandum in Lieu of Transcript of Hearing held September 25, 1979, dated October 26, 1979, filed in this cause

October 29, 1979 as document No. 483.

- B. The Court's Summary Judgment for Plaintiff dated November 30, 1979, as document No. 497.
- 2. With respect to credits due defendant Ralph Bouma as a result of said accounting, the court makes findings of fact as follows:
 - A. With respect to the property located in Teton County, Montana, referred to herein as the Agawam property, conveyed by defendant Ralph Bouma and wife to Larry C. Iverson, Inc. as a part of the down payment adjudged and declared void in the Summary Judgment for Plaintiff hereinabove incorporated herein, the court find defendant, Ralph Bouma is entitled to credit for the amount the Agawam property was allowed credit on the contract, in the sum of \$126,953.08, together with interest at the rate of 6%

per annum from Jly 17, 1968 to May 14, 1980, in the total amount of \$217,018.43.

B. With respect to contract farming performed on the property in Pondera County, Montana which was the subject of the contract voided by the Summary Judgment for Plaintiff, hereinafter referred to as the Iverson Land, and the cash advances made by defendant Ralph Bouma to the plaintiff, in the principal amount set forth in the first column of digits appearing in Exhibit A, Schedule 1, page 3 of said account, the court finds defendant Ralph Bouma entitled to credit for said principal amount with interest thereon (*) as follows:

^(*) Throughout this instrument, where interest is allowed, it shall be computed at the rate of 6% per annum from the specified commencement date to the specified termination date.

- (1) Item 1, contract farming: \$6,587.58 with interest from July 17, 1968 to May 14, 1980;
- (2) Item 2, contract farming: \$28,412.42 with interest from July 17, 1968 to May 14, 1980;
- (3) Item 3, cash advance: \$9,625.92 with interest from July 15, 1970 to May 14, 1980;
- (4) Item 4, cash advance: \$1,500.00 with interest from October 20, 1969 to May 14, 1980;
- (5) Item 5, cash advance; \$1,500.00 with interest from October 27, 1969 to May 14, 1980;
- (6) Item 6, cash advance: \$400.00 with interest from October 25, 1969 to May 14, 1980;

- (7) Item 7, cash advance: \$300.00 with interest from February 12, 1970 to May 14, 1980;
- (8) Item 8, cash advance: \$1,000.00 with interest from March 4, 1970 to May 14, 1980;
- (9) Item 9, cash down payment: The sum of \$5,000.00 with interest from July 17, 1968 to May 14, 1980, plus the sum of \$5,000 with interest from July 15, 1969 to May 14, 1980;
- (10) The amounts of principal and interest hereinabove allowed are set forth on Schedule A annexed hereto, by this reference incoporated herein, and entitle Ralph Bouma to credit for said items in the total sum of \$1000,167.12.
- C. With respect to real estate taxes assessed by Toole and Pondera County, Montana upon portions of the Iverson land, and paid by defendant Ralph Bouma, the court finds he is entitled to credit

for payments made as follows:

- (1) Upon the principal amount of said taxes with interest on the principal amount of each payment made commencing from the date of such payment to May 14, 1980;
- (2) The amount of said taxes and interest thereon as set forth in Schedule B appended hereto and by this reference incorporated herein, in the total amount of \$110,059.64, is the amount for which Ralph Bouma should be credited in this account with respect to real estate taxes paid.
- D. With respect to mortgage installment payments made upon the morgage on the Iverson property in favor of Federal Land Bank of Spokane, by Ralph Bouma, the court finds Ralph Bouma is entitled to credit on the annual installments of principal and interest

(totaling \$16,243.74) paid by Ralph Bouma, with interest on each of said payments from the respective dates of payment reflected on the checks received in evidence as Ralph Bouma Exhibits 9 through 19. The Court disallows and exludes from credit to said defendant the overtime interest paid by defendant Bouma with respect to the installment payments, accruing from the due date on each of said installment to the date of payment thereof. The credit allowed is as follows:

- (1) On \$16,243.74 with interest from July 28, 1970, to May 14, 1980;
- (2) On \$16,243.74 with interest from August 31, 1970 to May 14, 1980;
- (3) On \$16,243.74 with interest from August 6, 1971 to May 14. 1980:

- (4) On \$16,243.74 with interest from July 19, 1972 to May 14, 1980;
- (5) On \$16,243.74 with interest from July 9, 1973 to May 14, 1980;
- (6) On \$16,243.74 with interest from August 19, 1974 to May 14, 1980;
- (7) On \$16,243.74 with interest from August 19, 1975 to May 14, 1980;
- (8) On \$16,243.74 with interest from March 15, 1976 to May 14, 1980;
- (9) On \$16,243.72 with interest from August 25,1977 to May 14, 1980;

- (10) On \$16,243.74 with interest from August 16,1978 to May May 14, 1980;
- (11) On \$16,243.74 with interest from May 31, 1979 to May 14, 1980;
- (12) The amounts hereinabove allowed, the calculation of which is set forth in Schedule C, attached hereto and incorporated herein, in the total amount of \$240,070.42 is the amount for which Ralph Bouma is entitled to credit on said account for payment of said mortgage installment payments.
- E. With respect to improvements upon the Iverson property between July 17, 1969 and May 14, 1980, the court finds Ralph Bouma is entitled to credits, without interest on such credits, as follows:
- (1) For the Marvel Brute building \$17,358.00; erection thereof \$7,100.00; and floor \$9,000.00, for a total of \$33,458.00;

- (2) For three 7,500 bushel bins and six 22,000 bushel bins, the total sum of \$154,500.00;
 - (3) For the shop, \$8,000.00;
 - (4) For the Corrals, \$4,025.00;
 - (5) For the quonset floor, \$3,000.00;
 - (6) For the earthen dam, \$3,000.00;
 - (7) For restoration of acreage, \$38,000.00;
 - (8) For lining, overhead door and wiring quonset, \$3,200.00;
 - (9) For fencing, \$3,750.00;
 - (10) For road improvements, \$1,000.00;
 - (11) For underground fuel tanks, \$3,000.00;
 - (12) For 1976 improvements on grain bin, \$1,902.00;
 - (13) For dwelling remodeling, \$5,200.00;

- (14) For water system, \$2,039.00;
- (15) That the total amount of credit for which Ralph Bouma is entitled with respect to said improvements is the sum of \$264,074.00;
- F. With respect to amounts paid by defendant Ralph Bouma to Central Bank of Montana, Excrow 92 in connection with the contract declared void by the Summary Judgment for plaintiff entered herein, the court finds plaintiff is entitled to credit as follows:
- (1) On all payments disbursed by Central Bank or appropriated by said bank from payments made in 1969 and 1970, the amount of such disbursed or appropriated sums with interest from date of payment to May 14, 1980.
- (2) On all payments retained by Central Bank of Montana, the amount thereof together with all interest actually accruing thereon

to May 14, 1980.

- (3) The total of said credits hereinabove allowed, as set forth in Schedule D, annexed hereto and incorporated herein, is the sum of \$494,320.97.
- 3. With respect to credits due plaintiff as a result of said accounting, the court makes finds of fact as follows:
 - A. With respect to amounts recieved by defendant Ralph Bouma as a result of asserting ownership of the minerals in and under the Iverson property and leasing the same for oil and gas purposes, the court finds as follows:
 - (1) Plaintiff is entitled to credit in the amounts reported by defendant Ralph Bouma in his income tax returns between the years 1969 through 1979, in the total principal amount of \$34,748.00,

from December 31 for the year reported, to May 14, 1980.

- (2) The total amount of said oil lease income and interest thereon, as hereinabove specified, and as set forth in Schedule E appended hereto and incorporated herein, is the sum of \$41,215.46.
- B. With respect to crops harvested by Ralph Bouma between July 17, 1969 and May 14, 1980, the court finds as follows:
- (1) That the crops harvested during said period are as set forth in the first degital column appearing in Exhibit A, Schedule 5, page 11 of the Ralph Bouma accounting, in the total sum of \$1,907,014.90.
- (2) That plaintiff is entitled to one-third of said crops, in the principal amounts set forth in the second digital column appear-

ing in Exhibit A, Schedule 5, page 11 of the Ralph Bouma accounting, in total amount of \$635,671.64, together with interest on each annual crop from September 30th of each year to May 14, 1980.

- (3) That the total credit of which plaintiff is entitled for said crops and interest, as set forth in Schedule F hereof, incorporated herein, is the sum of \$819,321.08.
- 4. Upon the findings of fact hereinabove set forth, the court concludes as follows:
 - A. The credits due defendant Ralph Bouma hereinabove allowed him as set forth in paragraph 2 hereof exceed the credits due plaintiff as hereinabove set forth in paragraph 3 hereof, amount to the sum of \$565,174.04 as set forth in the recapitulation of credits in Schedule G appended hereto and by this reference incorporated herein,

and Bouma is entitled to judgment against plaintiff in this amount.

B. The court concludes that provision should be made for disposition of the crops to be harvested from the Iverson property during 1980, in the manner hereinafter set forth.

WHEREFORE, upon said findings of fact and conclusions of law, it is ORDERED, ADJUDGED AND DECREED as follows:

- (1) For appeal purposes, this judgment shall be considered a final judgment of a district court. The phrase "Upon this judgment becoming final", as hereinafter used, means the earliest date of occurance of any of the following: (a) Expiration of time for appeal of this judgment, without appeal; (b) In the event of appeal, entry of an order dismissing the appeal; or (c) Return of remittitur herein finally determining this judgment is affirmed, with or without modification on appeal;
 - (2) Upon this judgment becoming final, defendant Ralph Bouma

shall be paid all funds in the hands of the Receiver of Larry C. Iverson and all interest accured theron, retained by said Receiver from Central Bank Escrow 92. Said payment will constitue credit of the sum of \$456,217.43, representing the amounts in the hands of the Receiver at May 14, 1980 as set forth in Schedule D hereof plus all additional interest acutally accruing upon said sum subsequent to May 14, 1980 to date of disbursement thereof to Ralph Bouma;

- (3) The defendant, Ralph Bouma, shall have judgment against Plaintiff in the sum of \$108,956.61 (viz, \$565,174.04, less \$456,217.43) with interest thereon at the rate of 10% per annum from May 14, 1980 until paid.
 - (4) Each party shall pay his own costs.
 - (5) The defendant, Ralph Bouma, shall farm the Iverson farm for

the 1980 crop year and shall bear all costs of seed, etc. and furnish all labor in connection with said farming operation including the cost of harvesting. As compensation for his said services, Ralph Bouma shall be entitled to receive two-thirds of the crop harvested. Plaintiff's one-third shall be delivered by Bouma at his expense to such storage facilities or granaries situated on the Iverson Farm as plaintiff shall direct.

- (6) At the end of the 1980 crop year, Bouma shall be reimbursed for the summer fallow remaining on the Iverson farm at that time at the going rate for summerfallow in the Ledger, Montana area.
- (7) Save and except for Ralph Bouma's judgment lien in the sum of \$108,956.61 plus interest created by reason of paragraph (3) of this judgment, title to the land described in plaintiff's complaint

filed herein and in the summary judgment for plaintiff filed herein, is hereby quieted in plaintiff against the claims of all defendants herein.

DATED this 8th day of September, 1980.

Leonard Langen
DISTRICT JUDGE

APPENDIX B

Gale R. Gustafson, argued, Conrad, for defendants and appellants.

Swanberg, Koby, Swanberg & Matteucci, Great Falls, Raymond F. Koby, argued, Great Falls, Church, Harris, Johnson & Williams, Great Falls, Cresap S. McCracken, argued, Great Falls, for Plaintiff, respondent and cross appellant.

DALY, Justice.

On December 10, 1971, the receiver commenced this action in the Ninth Judicial District fo the State of Montana, in and for the county of Pondera, for the purpose of obtaining a decree adjudging documents comprising an installment contract naming Larry C. Iverson, Inc., as seller, and Ralph Bouma, as purchaser, to be invalid, to regain possession of and quiet title to the 4,520 acres of farmland embraced in the contract, together with appropriate ancillary relief including an accounting by the Boumas.

In August 1978, plaintiff and the receiver joined in a motion for summary judgment, asserting that the Bouma contract was void as a matter of law. On September 25, 1979, the motion for summary judgment came on for hearing before the then presiding district judge, the Honorable Leonard H. Langen, who granted the motion for summary judgment. The court reporter's notes containing the order as announced from the bench were

discovered missing following a break-in of her automobile before the notes were transcribed. Consequently, Judge Langen prepared and filed a "Memorandum in Lieu of Transcript of Hearing" in October 1979. On November 30, 1979, a formal summary judgment for plaintiff was entered which adjudged the Bouma contract void and ordered the Boumas to account for the money, rents, issues and profits derived from possession of the farm.

Boumas filed their accounting on February 21, 1980. Hearing on the accounting was held May 12, through 14, 1980. On September 9, 1980. the court entered its findings of fact, conclusions of law, judgment and decree on accounting, setting forth all of the respective adjustments found by the court to be appropriate between the parties in conjunction with restoration of the farm to the corporation

In February 1980, following entry of the summary judgment for the corporation and denial of Boumas' motions, the Boumas filed a notice of appeal to this court. Boumas requested an order deferring prosecution of the appeal, and this request was granted in an order of this Court dated February 29, 1980, deferring prosecution until thirty days after the conclusion of the accounting and final adjustment and settlement. Notice of entry of judgment was given by the clerk of court September 10, 1980, and this appeal followed.

To fully comprehend the nature of this case, it is necessary to include a history of the facts and procedures. This matter began when the Larry C. Iverson Corporation, hereinafter called "the corporation" was incorporated on July 17, 1964. The corporation is a Montana corporation with its principal place of business at Ledger, Montana.

It was capitalized for \$500,000 divided into 5,000 share of a

single class of common stock of \$100.00 par value. It was organized be governed in its business by a board of directors of three persons empowered to elect officers to perform the executive functions of the corporation.

On August 19, 1964, a total of 2,523 shares of stock of the corporation were issued to the following named persons in certificates as follows:

| Stockholder | Cert. # | No. of Shares |
|---------------------|---------|---------------|
| Larry C. Iverson | 1 | 463 |
| Linda M. Iverson | 2 | 1 |
| Mabel Iverson | 3 | 58 |
| Mabel Iverson | 4 | 450 |
| Irene A. Keierleber | 5 | 300 |

| Gilbert F. Keierleber | 6 | 300 |
|-----------------------|----|-------|
| Connie Iverson Fulton | 7 | 440 |
| Darrell L. Brown | 8 | 1 |
| Carl O. Iverson | 9 | 450 |
| Carl O. Iverson | 10 | 60 |
| TOTAL SHARES | 3 | 2,523 |

Further, on November 22, 1965, the following certificates were issued to replace lost certificates representing shares in the corporation:

| Stockholder | Cert # | Issued to Replace | No. of Shares |
|---------------------|--------|-------------------|------------------|
| Irene A. Keierleber | 11 | 5 | 300 |
| Mabel Iverson | 12 | 3 | 58 |
| Carl O. Iverson | 13 | 10 | 60 |

In December 1964, Carl and Mabel Iverson and Gilbert and Irene Keierleber hired J. Milton Krull and John C. Treadaway as business managers for the corporation. Krull and Treadaway continued as business managers, consultants, purported officers, directors and stockholders of the corporation until it went into receivership in November 1970. In the receiver action it was adjudged that Krull and Treadaway were corporate usurpers, and they were "stripped" of their titles and any interest they "did not" have.

Soon thereafter, the stockholders of the corporation came upon hard times any and March 16, 1967, Farmers State Bank of Conrad had become the owner of 450 shares of Mabel Iverson's stock (of the original issue) and 450 shares of Carl Iverson's stock (of the original issue)

Farmers State Bank acquired the ownership as a result of a pledge of the shares by Carl and Mabel on which the bank eventually had to foreclose. Also, as a result of this foreclosure, the corporation was able to redeem as treasury stock and become the equitable owner of 182.7 shares of the 900 shares now owned by Farmers State Bank. Prior to the above foreclosure, on July 21, 1966, in Helena, Montana, United Bank of Pueblo purchased, at a sheriff's sale, 118 shares of stock of the corporation then owned by Carl and Mabel Iverson.

The other major stockholders also fell on bad times. Gilbert and Irene Keierleber were adjudicated bankrupt on January 24, 1966. As a result, the trustee in bankruptcy, Stanley M. Swaine, became the owner of the Keierlebers' stock - that is, Stanley M. Swaine, as

trustee in bankruptcy of the estate of Irene Keierleber, became the owner of 300 shares of stock, and, as trustee in bankruptcy of the estate of Gilbert Keierleber, he became the owner of 300 more shares subject to a pledge to Farmers State Bank.

As a result of the above events, the corporation by March 16, 1967, was "owned" by almost a completely new set of shareholders. The ownership was as follows:

| Stockholder | Shares |
|---|--------|
| UNITED BANK OF PUEBLO | 118 |
| CONNIE IVERSON FULTON (Subject to pledge to the United Bank of Pueblo for the purchase price at par value of \$100 per share) | 440 |
| FARMERS STATE BANK OF CONTRAD | 717 |

| Stockholders (cont'd) | Shares (cont'd) |
|--|-----------------|
| STANLEY M. SWAINE, as trustee in bankruptcy of the estate of Irene Keierleber | 300 |
| STANLEY M. SWAINE, as trustee in bankruptcy of the estate of Gilbert Keierleber (subject to a pledge to the Farmers State Bank of Conrad) | 300 |
| LARRY C. IVERSON, INC., (as treasury | 648 |
| stock) Total | 2,523 |

Farmers State Bank, the trustee and United Bank had all made demands upon the corporation, Krull and Treadaway for issuance of stock certificates to them, but these demands were refused. This resulted in state court actions, Nos. 8221 and 8073 respectively, in the District Court of the Ninth Judicial District, Pondera County, to quiet title to

the ownership of the stock. The District Court found for the Farmers State Bank, the trustee and United Bank and awarded them title on April 7, 1971.

It is necessary at this juncture to include several factual events transpiring prior to the sale of 4,520 acres of farmland from the corporation to the defendants-appellants Bouma in July 1968. From the findings of fact and conclusions of law of Cause Nos. 8221 and 8073, it was found that a purported meeting of stockholders as held in Phoenix, Arizona, on November 22, 1965, which resulted in a second issue of stock to be distributed on January 3, 1966. However, it was found that not only was the meeting improper but that no compensation was given to the corporation for the stock issued and the amount of stock issued was in

excess of that authorized by the articles of incorporation.

There was another "event" which took place in January 1967 and was discussed by the District Court. This "event" was another improper shareholder meeting in Dillon, Montana. At this meeting, attended only by Carl Iverson, Krull and Treadaway, it was decided to cancel all the shares of the second issue and to authorize a third issue. No consideration was given for the 2,595 share "created", and 2,477 shares were "given" to Krull and Treadaway. It is important to note that at the time of this meeting at least 600 shares of the originally issued stock was "equitably" owned by Stanley Swaine, as trustee in bankruptcy for the Keierlebers.

Although there were numberous events transpiring after incorporation

in 1964 that well illustrate the manner in which the corporation was mismanaged, suffice it to say that the contract in question here was the fountainhead. In July 1968 the corporation purported to sell 4,520 acres of land to Ralph Bouma on a contract for deed for a purchase price of \$734.500. The validity of the sale of land to Ralph Bouma (hereinafter called the Bouma contract) is the underlying issue of this appeal. Again, a history of the contract negotiations, terms, result, etc., is necessary to provide a clear understanding of the issue at hand. It is important to keep in mind, while reading the following factual summary, that 76 percent of the corporation was "owned" by Farmers State Bank of Conrad, United Bank of Pueblo, and Stanley Swaine, trustee in bankruptcy for the Keierlebers, at least a year before the Bouma contract.

In July 1968 approximately 4,500 acres of land of the corporation was sold to Ralph Bouma on a contract for deed for a purchase price of \$734,500. Bouma made a partial downpayment to the corporation in the form of a trade of 1,440 acres of land located in Teton County (hereinafter called the Agawam place) at an allowance of \$150 per acre. Though not immediately relevant, it was found from the District Court's findings of fact and conclusions of law that six weeks after the sale, the Agawam place was resold by Krull and Treadaway, acting for the corporation, to the father and brothers of Ralph Bouma at a price of \$92.50 per acres, resulting in a loss of \$82,800 to the corporation. Also, the father and brothers sold the Agawam place one year later a \$120 per acre.

The sale of the corporate farm occurred during a purported directors meeting in Phoenix, Arizona, on July 19, 1968. The parties involved at

the meeting were Treadaway, Krull and Carl and Mabel Iverson. There were no other shareholders at the meeting, and there is no record of any notice having been given to any of the shareholders about the meeting. Also, no publication of notice or filing of the resolution authorizing the sale was published in the local newspaper, and no filing of the certificate of proceedings and no resolution authorizing the sale was published in the local newspaper, and no filing of the certificate of proceedings and no resolution authorizing sale was made with the Pondera County clerk and recorder. Further, no Montana attorney was retained during the transaction, no title investigation was undertaken, and the contract authorized payment of 44 percent of the unpaid installment balance of the contract directly to Krull and Treadaway.

In 1968 Farmers State Bank and Stanley W. Swaine commenced a stock-holders derivative action against the corporation and the persons controlling it (District Court Cause No. 8073). In 1969 United Bank of Pueblo commenced an action for similar relief and for corporate dissolution (Cause No. 8221). These actions were consolidated during trial and concluded in 1971 with the exception of continuing jurisdiction to govern the receivership of the corporation. George Campanella was appointed receiver pendente lite and his status as receiver was affirmed in the final judgment.

The receiver then proceeded in 1971 against Bouma to recover the 4,520 acres of land which was originally the principal asset o the corporation. In February 1978, the Honorable B.W. Thomas granted a

petition of the receiver for relief from his responsibilities in pursuing the recovery of the acreage. The present stockholders reorganized the corporation under the directive of Judge Thomas and continued the action (Cause No. 8509) as a partially reconstituted corporation. It was not until September 25, 1979, that Judge Langen granted plaintiff-respondent's motion for summary judgment. In so doing he brought to an end some fifteen years of litigation involving the corporation wich began with a receivership action by Farmers State Bank in 1965.

In the summary judgment motion, Judge Langen held that, as a matter of law, the persons with whom Bouma dealt and from whom he obtained the Bouma contract - namely, Krull, Treadaway and the Iversons - were without lawful authority to contract in behalf of the corporation, and, therefore, the contract was void. The judge also found that Bouma knew,

or should have known, that these purported officers of the corporation did not have the authority to authorize the sale.

The court reporter's notes containing the order as announced from the bench of September 25, 1979, were discovered missing following a break-in of her automobile before they were transcribed. Judge Langen, therefore, prepared and filed a "Memorandum in Lieu of Transcript of Hearing" in October 1979. On November 30, 1979, a formal summary judgment for plaintiff was entered which adjudged the Bouma contract void and ordered Boumas to account for the money, rents, issues and profits derived from possession of the Iverson farm.

Appellants filed their accounting of February 21, 1980. Hearing on the accounting was held May 12 through 14, 1980. On September 9, 1980, the courtentered its findings of fact, conclusions of law, judgment

and decree on accounting (hereafter "accounting decree") setting forth all of the respective adjustments found by the court to be appropriate between the parties in conjunction with restoration of the Iverson farm to the corporation.

In the accounting decree the Boumas were allowed credit for two-thirds of the crop harvested during the period between the Bouma contract date of April 17, 1968, to the date of the accounting hearing which closed May 14, 1980, together with interest on each annual crop from September 30 of each year. As a result of this finding, Boumas were allowed crop share and interest thereon totaling \$819,321.08.

In a prehearing brief filed by the corporation in April 1980, the corporation furnished argument and authority to the court in support of its contention that the Boumas should be treated as "willful trespassers" not entitled to the fruits of their wrongul occupation of the

Iverson farm. The court disagreed with this contention and made the crop harvest award as previously described.

In its accounting decree, the court also allowed the Boumas credit totaling \$264,074 for the value of certain improvements made to the Iverson farm, to the extent of the enhanced value of the property resulting from the improvements. That is as follows:

| Improvement Per Accounting Decree Page 6 | Cost or Replacement Cost Per Boumas Acct | Credit Court Allowed Bouma |
|--|---|-------------------------------|
| Three 7,500 bu. bins & six 22,000 bu. bins | \$106,352 | \$154,500 |
| Restoration of acreage | 4,000 | 38,000 |
| Totals | \$110,352 | \$192,500 |

The 7,500 bushel bins were installed in 1975 and 1976 and the 22,000

bushel bins in 1976. The acreage restoration took place over a period of six or seven years. The excess allowance was awarded over the corporations objections that the enhanced value should be restricted to the costs thereof.

The 1968 Bouma contract purported to convey the Iverson farm, minerals and all, to the Boumas, less and "undivided one-half interest in the landowner's oil and gas royalty interest which it now has". Later, for credit against his running account at \$1 per acre. Ralph Bouma procured a "mineral deed" from Krull and Treadawary purporting to convey the corporation's minerals on and under the Iverson farm to Bouma. When Bouma was shown to have received \$34,748 in oil revenue from the Iverson farm and could not rely upon the void Bouma contract, he asserted the revenue was his by virtue of the "mineral deed". Judge Langen ruled,

over the Boumas' objections, that the corporation was entitled to the oil money with interest. Boumas raised the issue again in their motion to alter or amend the accounting decree. The trial judge reversed himself and deleted from credits awarded the corporation the sum of \$41,215.46, being the \$34,748 oil revenues with accrued interest.

In February 1980, following entry of the summary judgment for the corporation and denial of Boumas' motions pursuant to Rules 52, M.R.Civ.P., the Boumas filed notice of appeal to this Court. Boumas requested an order deferring prosecution of the appea., and this request was granted in an order of this Court dated February 29, 1980, deferring prosecution until thirty days after the conclusion of the accounting and final adjustment of accounts by notice of entry by the clerk of court of the final

order of judgment. Notice of entry of judgment was given by the clerk of court September 10, 1980.

In conclusion, the matters that now stand before this Court are the appeal by the Boumas of the District Court's ruling on summary judgment and the cross-appeal by the corporation on the District Court's accounting decree.

Numberous issues have been presented to this Court for review by appellants Bouma. The nineteen issues set forth in appellants' brief can be summarized as follows:

- 1. Did the District Court err in holding that the disputed contract was void?
- 2. Were there genuine issues of material fact in the case which made summary judgment inappropriate?

- 3. Are any of the appellants' "defenses" sufficient to warrant reversal of the summary judgment (i.e. (a) laches, (b) estoppel, (c) ratification, (d) statute of limitations, (e) etc.)?
- 4. Did the District Court err in substituting as plaintiff the partially reconstituted corporation in place of the plaintiff receiver while the corporation remained under receivership?

The following issue is presented by cross-appellant Iverson Inc.:

1. Did the District Court err in its accounting decree?

We note at the outset of this opinion that Ralph Bouma, one of the appellants, has been obliged in every way. This Court has tried to be fair and impartial regardless of the fact that Mr. Bouma has failed to reciprocate. He has publicly accused this Court and its indiviual

justices of conspiring against him and of using their positions to his personal detriment. Mr. Bouma has even gone so far as to file an action in Federal District Court alleging that the justices of this Court have violated his civil rights. That is his right. However, Mr. Bouma does not seem to realize the law cannot be, and will not be, distorted to satisfy the personal whims of one man - for ours is a system of laws not men.

From the facts and appellants' contentions it would seem that this case presents numberous complex legal issues requiring careful legal analysis. Actually, the only real problem is trying to "find" the issues through the deluge of irrelevant material that appellants have presented to this Court. This appears to be the appellants' "style", as they have continued over the years to inundate the oppoing party, the lower court and this Court with reams of unnecessary papers, files, and demands.

One need only to read this Court's comments toward appellants in two prior matters to grasp the degree to which the appellants have made a mockery of the appellate process.

We were first introduced to the appellants in Farmers State Bank of Contrad v. Iverson, et a., and Bouma (1973), 162 Mont. 130, 509 P. 2d 839. This Court found that the appellants never even filed the appropriate papers seeking to intervene in a case in which they alleged they were entitled to be interested parties. The Court said: "In addition we must comment on the 'back door' attempt by petitioners and appellants [Boumas] to introduce extraneous evidence in these proceedings by attaching Appendix 'A', 'B' and 'C' to their brief on appeal". 509 P. 2d at 841. The Court added, "We strongly condemn this practice

by counsel for appellants and use this occasion to warn other parties to furture appeals that this practice will not be tolerated". The Court dismissed the appeal as frivolous and assessed damages of \$1,000 under Rule 32, M.R.App. Civ.p., for bringing an appeal with merit.

In Campanella v. Bouma (1974), 154 Mont. 214, 520 P. 2d 1073, 1074, this Court again notedthat the appellants had filed motions unheard of in the law and set forth twenty-eight counts of error that were termed frivolous, impertinent, and immatrerial. The Court, stated: "Specific instances shall go uncited at this time, however it is apparent that in the past Mr. Bouma has used his lack of representation to his advantage in these proceedings and has also used the fact of his wife's representation also to his advantage." 520 P. 2d at 1075. The Court further stated:

"In so ruling, the Court has attempted to retain its objectivity, continuing to assume that such motion [motion for substituion of appearances) was legitimately motivated, an exceedingly difficult task considering the motion is absurd in nature, irrelevant and scandalous in content and vituperative in tone." 520 P. 2d at 1078. Finally, this Court, while on the brink of holding that appellants' motion was contemptuous, stated: "There is no place in our judicial system for such an undignified product even if a member of the bar had not lent his name to it". 520 P. 2d at 1078. It is apparent that the appellants do not take heed of this Court's warnings but continue to present frivolous, scandalous, burdensome, inane and totally irrelevant materials for review.

Issue 1: Did the District Court err in holding that the disputed contract was void?

[1] The District Court's ruling was based on only one narrow issue. This sisue was the basis for the granting of the corporation's summary judgment motion. After reviewing the affidavits, depositions, documents, court decrees, orders and findings of fact and conclusions of law from consolidated causes 8221/8073, the District Court found that the contract was void from the start. Though there may have been numerous materials presented to the court, the judge found that the whole matter boiled doen to the validity of the contract. The Court's finding that the contract was void is well supported by the facts and the law.

Form the findings of fact and conslusions of law of causes 8221/8073 it was determined that the corporation met only twice before the Bouma contract was entered into. The first time was on August 19, 1964, when the corporation was orgainized, and the second time was in Dillon, Montana, on January 1967. The first meeting as a proper meeting, and it

was at this meeting that the corporation attempted to adopt a bylaw that may have prevented the later contract from being void. The bylaw contained the following provisions:

"The Board of Directory shall have the power and general authority to sell, lease, mortgage, exchange or otherwise dispose of the whole or any part of the property and assets of every kind and description of the corporation, for property for the whole or part of the capital stock of any other corporation..."

This bylaw was never made effective. Sections 15-908, R.C.M., 1947, which were then in effect, required that, for this type of bylaw to be effective, it must be noticed an published in a newspaper printed in the county clerk and recorder in the same fashion as specific authorization meetings for the sale of substantially all of a corporation's

assets. The affidavit of the publisher of the local newpaper, Jack Lee, and the affidavit of the county clerk and recorder, Gladys Mortenson, both establish that no notice was published and no filling of the bylaw was made.

Section 15-908, R.C.M. 1947, provided in part:

"Stockholders may adopt by-law giving directors power to sell or lease property of corporation - limitations on which authority. At any meeting of the stockholders of any corporation called and noticed in the manner provided by this chapter, the stockholders may... adopt a by-law giving the board of directors of such corporation such general authority to sell, lease, mortgage, exchange or otherwise dispose of the whole or any part of the property and assets of every kind and description of such corporation..."

Section 15-909, R.C.M. 1947, provided in part:

"Same-contents of resolution and notice. The resolution calling the meeting and the notice mailed to stockholders and published shall state that the meeting is called for the purpose of considering the adoption of a by-law empowering the board of directors of the corporation to sell, lease, morgage, exchange, or otherwise dispose of the whole or any part of the property and assets of every kind and description of such corporation, for property, or for the whole or part of the capital stock of any other corporation, whether domestic or foreign, or otherwise. In all other respects notice shall be given and the meeting shall be had and a copy of the minutes thereof shall be filed as provided by this chapter."

Appellants cannot expect a court to overlook a statute that is clear in its intent.

- [2] There is further case law and encyclopedia law to support the judge's ruling. In the case of Hanrahan v. Andersen (1939), 108 Mont. 218, 90 P. 2d 494, 499, the Court held:
 - "... it is equally well settled in the absence of express statute, that in the case of a solvent corporation which has accumulated property for use in its business, neither the directors, nor even the stockholders except by unanimous vote, have the authority to dispose of such property except in the furtherance and in the ordinary course of the business; for otherwise the authority is being used to defeat, to that extent, the very purpose for which the authority was given..."

Also, in 19 C.J.S. Corporations, § 1240 at 932, it is found that: "Sales and assignments by corporations, to be valid, must be within the corporate powers, made in good faith and in conformity with governing charter or

statutory regulations." The law is clear on this point. It is not proper for a corporation to sell its property assets, in this case the only real asset, without following the requisite statutes, unless there is a bylaw provision that has been properly filed and published to allow it.

Further, from the findings of fact and conclusions of law of causes 8221/8073, it was found that the parties who represented the corporation at the time of the Bouma contract, August 1968, were without authority to act for the corporation. Thus, the people who purported to represent the corporation lacked the capacity to contract. Worman Motor Co. v. Hill (1939), 54 Ariz. 227, 94 P. 2d 865; 17 C.J.S. Contracts,§ 27 at 630.

It is also to be observed, by way of limitation of the doctrine of

Ultra Vires, that an attempted conveyance by the officers of a corporation of its property without authority does not involve the doctrine of ultra vires, but of agents to act on behalf of their principal without authority. 19 Am, Jur 2d § 963 at 441; Hotaling v. Hotaling (1924), 193 Cal. 368, 224 P. 455, 56 A.L.R. 734. In Hotaling, a board of directors meeting was held to decide whether certain property of the corporation was to be sold, and under the bylaws of the corporation a majority of the board of directors was necessary to approve a property sale. At the meeting only two of the five directors voted. The court ruled the contract void and that this act was not a question of ultra vires but of agents who acted on behalf of a principal (the corporation) without the authority to do so.

Without the bylaw necessary to provide an exception to the statutory rules, the "purported" directors were required to follow strict statutory procedure to sell the farmland to the appellants. In pertinent part section 15-901, R.C.M. 1947, applicable at the time of the contract, provided:

"Procedure for sale, lease, etc., of corporate property - call of stockholders' meeting. The board of directors or trustees of any stock corporation ... shall have power, and upon request of stockholders representing at least one-half (1) of the captial stock outstanding and ... entitled... to vote at the meeting hereinafter provided for, it shall be their duty to call by resolution a meeting of the stockholders of sch corporation, appearing as such upon its books, and entitled to. vote at such meeting, as aforesaid, for the prupose of considering the question of selling, leasing, mortgaging, exchanging, or otherwise disposing of the whole or any part of the property and assets of every kind and description of such corporation, for property, or for the whole or part of the capital stock of any other corporation, whether domestic or foreign, or otherwise. Such meeting shall be held at the principal place of business of such corporation, and at least thirty (30) days previous notice of the time and place of such meeting..."

Section 15-902, R.C.M., 1947, provided in pertinent part:

"Notice of stockholders; meeting - contents-mailing -publication. The secretary of the corporation sahll make out and deposit in the United States post office, postage paid, a notice of such meeting, directed to each stockholder of record of the corporation, entitled to vote at such meeting, as aforesaid, by his name and his place of residence appearing on said records, and shall make and file his affidavit os such deposit... The notice shall state the time, place and

and the purpose of the meeting, and shall contain a complete and specfic statement of the proposal to be considered and acted upon at said meeting, including in all cases where only a part of the property of such corporation is affected, a general description of the property proposed to be sold, leased, mortgaged, exchanged, or otherwise disposed of. A similar notice shall also be published at least once a week for at least four (4) consecutive weeks preceding the day of said meeting, in some newspaper of general circulation published in the county wherein the principal place of business of such corporation is located .. " Further, section 15-903, R.C.M. 1947, provided:

"Organization of meeting-vote on proposal adoption of resolution.

Upon the day appointed for said meeting... if stockholders representing at least two-thirds (2/3) of the whole number of shares of the capital

stock of said corporation then outstanding, and of record on the books of the corporation, and entitled, as afresaid, to vote at such meeting, appearing at said meeting in person or by agents or proxies, as above provided, vote in favor of any such proposition, whether proposed by the directors or trustees, or not, as said stockholders may see fit, which proposition shall be in the form of a resolution specifying the particulars thereof and entered on the minutes of said stockholders' meeting, the said proposition or resolution shall be taken and adopted as the act of the corporation, and shall be carried out as such, and shall be approved and adopted by the board of directors or trustees." And, section 15-905, R.C.M. 1947, provided:

"Secretary to enter result in minutes-copy thereof to be filed with county clerk of countines where corporation owns real estate. The

secretary of such meeting shall enter upon the minutes of said stockholders meeting the total number of shares, and the number of share of each class, voted for or against the proposition or resolution, and by whom voted, and stockholders voting against said proposition or resolution shall be taken as dissenting therefrom. Upon the adoption of any proposition or resolution such as above referred to, by the stockholders meeting, the secretary of the meeting shall make out a true and complete copy of the minutes of the stockholders' meeting, which shall be signed by the chairman of such meeting, and attested by said secretary and verified by them and acknowledged as required in the case of conveyance of real estate, and shall file the same for record in the office of the county clerk and recorder of the county wherein the principal office or place of business of such corporation is situated, and also in the

office of the county clerk and recorder of any other counties wherein any of the real property included in the proposition or resolution adopted by said stockholders' meeting is situated."

Finally, section 15-501, R.C.M. 1947, provided:

"Meeting of stockholders and board of directors-where held. The meetings of the stockholders of a corporation must be held at its office or principal place of business in the state of Montana, except as hereinafter provided..."

The statutory language is clear. A corporation must comply with the statutes to properly convey corporate property. Failure to do so has been addressed by this Court in Hanrahan v. Anders, supra. In Hanrahan this Court held that failure to comply with the statutes in a transaction of this type voids the contract. The case dealt with a

conveyance of substantially all the assets of a corporation. Section 15-901 through 15-910, R.C.M. 1947, were all codified as section 6004, R.C.M. 1921, and these same statutes were in effect at the time of the Bouma sale. The court held in Hanrahan, 90 P. 2d at 500, as follows:

"Defendants contend that these transfers to Consolidated and Andersen do not come within the provisions of section 6004, because Capital retained its official books, records and office, and thereafter transacted business and was shown thereafter to have had other property. The argument overlooks the reason for the rule. If the question were merely whether the corporation had other property after the transaction no sale could ever be objected to by a minority stockholder, for in any sale other property is received as consideration. Furthermore, the stat-

ute refers to the sale of 'the whole or any part' of the property. Every part of the statute must be construed as having some meaning, and since the obvious purpose of the statute was to enlarge corporate powers to sell property, it must be construed as authorizing sales not already within the powers of the board of disrectors because not in the furtherance and in the ordinary course of the corporation's established business. In any event it is apparent from the record that both transactions involved all. of the corporate assets and greatly affected the established corporate business, and therefore came well within the class of transactions necessitating compliance with the statute. "The conveyance to Consolidated was a nullity, for the stockholders. meetings purported to authorize it were held on insufficient notice. Whether the defects indicated in those proceedings were material need not be considered.

".... Furthermore, the trust deed to Andersen was obviously void because of failure to comploy with the provisions of section 6004;"

(Emphasis added).

Also, in Schwartz v. Inspiration Gold Mining co. (D.Mont. 1936), 15 F. Supp. 1030, 1036, the court came to a similar conclusion:

"The statute requires that 'notice shall state the time, place and the purpose of the meeting' [of stockholders]; 'and shall contain a complete and specific statement of the proposal to be considered and acted upon at said meeting.' Section 6004, Rev. Codes Mont . 1921, as amended, Sess. Laws 1931, pp. 108, 107, c. 42, § 1...

"No answer to any of these inquiries can be found in the notice here under consideration. It follows that the notice does not 'contain a complete and specific statement of the proposal to be considered and

and acted upon at the meeting'; with the result that the same does not meet the requirements of the Montana statute and is insufficient in law to set the power of the stockholders of the defendant coporation in motion. Jones v. Vance Shoe Company (C.C.A. 7th Cir.) 115 F. 707, 708; Forrester v. Boston & M. Mining Company, 21 Mont. 544, 55 P. 229, 253; Thompson on Corporation (3rd Ed.) pp. 106 and 284."

Clearly, the courts have held that the statutes regulating the sale of corporate assets must be strictly followed and that the failure to do so will result in the transaction being declared a nullity.

The only law in support of appellants' position, not cited by appellants can be found at 9 A.L.R. 2d 1297, and can easily be distinguished.

There is a discussion in this section of when and how a corporation in

the business of selling property need not have shareholder approval to sell coporate assets. However, the section draws a distinction where a corporation is selling its only major asset and holds that in those circumstances shareholder approval is necessary. Further, another distinction can be found in the fact that there is no mention of how state statutes affecting corporate property sales may affect the validity of a sale without shareholder approval.

The facts and law in support of Judge Langen's ruling does not end here. In the findings of fact and conclusions of law in causes 8221/8073, the court held that the directors meeting in which the Bouma contract came to pass was a total sham. The reasons are clear. The corporate law at that time required that for a person to be a corporate director,

they also had to be a stockholder. None of the parties present at the Phoenix "directors" meeting were stockholders. That is, Mabel and Carl Iverson had lost their stock to Farmers State Bank over a year before this meeting was called. Krull and Treadaway had never owned stock in the corporation and did not own any at the time of the meeting. Also, all theirother stock was held by various interests that were not present at the meeting.

The reasons that no stockholders were in attendance at the meeting was that no notice of the stockholders meeting was even given, contrary to Chapter 9, Title 15, of the Montana Corporation Code, then in effect. Also no provision was made for protection of the rights of dissenting stockholders, as the statutes required. No publication of notice or filing of the resolution authorizing the sale was published in the local

newspaper, and no filing of the certificates of proceedings and resolution authorizing the sale was made with the Pondera County clerk and recorder. Quite simply, the meeting was a farce.

[3] Appellants argue that the shareholders who were present were the shareholders of record and that, Farmers State Bank, United Bank of Pueblo and Stanley Swaine were not shareholders of record and, therefore, not entitled to notice. This argument flies in the face of the law and the reality of the situation. First of all, Montana case law holds that a person may be owner of stock in a corporation even though certificates of stock have not been issued. Heniningsen v. Stomberg (1950), 124 Mont. 185, 221 P. 2d 438. Secondly, it required a suit by Farmers State Bank, United Bank of Pueblo and Stanley Swaine to have their interests recognized. Farmers State Bank of Conrad v. Iverson

(1973), 162 Mont. 130, 509 P. 2d 839. The fact that Krull and Tread-away refused to issue certificates until they were forced to do so by court order does not mean that the aforementioned parties were not shareholders. Thus, the meeting was held by parties incapable of authorizing anything, much less a sale of the only major corporate asset.

Of importance in any determination is the manner in which Bouma conducted himself at the time of the sale. No Montana attorney was retained in connection with the transaction. No title investigation was conducted by Boumas on a three-quarters of a million dollar land transaction. The contract authorized payment of 44 percent of the unpaid contract installment balance directly to Krull and Treadaway instead of to the corporation. These facts illustrate the existence of questionable circum-

stances. Further, the fact that Bouma's ranch, the Agawam place, was purchased by the corporation for \$150 per acre and six weeks later sold to members of Bouma's family, together with the fact that Bouma admitted knowing of the Farmers State Bank action and even being told of Farmers State Bank interests by Krull and Treadaway indicate that Judge Langen's ruling was not contrary to the weight of the evidence.

It is apparent from the record in this case that the transactions involved virtually all of the corporate assets, greatly affected the established corporate business and, therefore, came well within that class of transactions necessitating compliance with the statute. Accordingly, there was a pretense to comply with the law, and the failure to do so caused the contract to be void. There is no question that the meeting was a sham and that the shareholders entitled to vote, 76 percent

of the corporation, were not notified and not represented. Appellants knew about the shareholder action, took a gamble when they "purchased" the Iverson farm and lost.

Issue 2: Were there genuine issues to material fact in the case which made summary judgment inappropriate?

Summary judgment is proper"... if the pleadings, depositions, answers, to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law..."

Rule 56(c) M.R.Civ.P.

Appellants contend that the DistrictCourt erred in granting the corporration's summary judgment motion because there were material issues of fact that were present and must be adjudicated by a trial.

Appellants urge that they presented sufficient evidence to support their

own summary judgment motion and to deny the respondent's motion. Appellants argue that because of their "numerous affidavits" the motion should be denied. Also, they contend that the contract voidability was a question of fact for a jury, that the judge's misquotation of their seventh defense was improper and that somehow res judicata has been impoperly used against them. None of these arguments are on point.

Nor are any of them sufficient to warrant a reversal of the District Court's ruling.

[4] Appellants presented nothing but fanciful and frivolous material, nothing which could be considered to be of a substantial nature. This is contrary to the law in Montana. Cheyenne W. Bank v. Young (1978), 179 Mont. 492, 587 P. 2d 401, 35 St. Rep. 1806. The case law in Montana is clear on this issue and has been repeated and discussed numerous times. In Flansberg v. Montana Power Co. (1970), 154

Mont. 53, 460 P. 2d 263, the Court held that the burden is upon the party opposing the motion to present evidence of a substantial and material nature raising a genuine issue of fact. Once the corporation had presented its facts in support of the motion, appellants had the burden of opposing the motion with their own facts. They failed to do so.

The case law is explicit and the citations abound that the burden shifts to the party opposing the motion to present material and substantial facts to oppose the motion. Harland v. Anderson (1976), 169, Mont. 447, 548 P. 2d 613; Taylor v. Anaconda Federal Credit Union (1976) 170 Mont. 51, 540 P. 2d 151; Rumph v. Dale Edwards, Inc. (1979), Mont. 600 P. 2d 163 36 St. Rep. 1022; 6 Moore's Fed. Prac. 56.16. In State ex rel. Burlington Northern v. District Court (1972), 159 Mont. 295,

496 P. 2d 1152, we affirmed the rule that:

"Failure of the party opposing the motion to either raise or demonstrate the existence of a genuine issue of material fact, or to demonstrate that the legal issue should not be determined in favor of the movant, is evidence that the party's burden was not carried. Summary judgment is then proper, the court being under no duty to anticipate proof to establish a material and substantial issue of fact." 496

P. 2d at 1155.

In Harland v. Anderson, supra, the Court held that once the burden has shifted, the party opposing the motion is held to a standard of proof which is as substantial as that initially imposed on the moving party. Finally, in Naegieli v. Daniels (1955), 145 Mont. 323, 400 P. 2d 896, the Courtheld that the trial court, in considering a motion for

summary judgment, has no duty to anticipate possible proof that might be offered under the pleadings and that asking for such foresight demands "clairvoyance" not possessed by even a trial judge. The contentions for reversal that appellants argued (i.e., re judicata, contract voidability, etc.) were not presented in a substantial and material manner to the trial court.

The court found the contract void because the reams of evidence presented by the respondent supported it, and one need only to look to the previous discussion to see that the evidence was awesome. Appellants had to present evidence to oppose this material. They did not, and therefore the summary judgment motion was proper.

Appellants contend that the manner in which the judge construed their

seventh defense should be sufficient to deny the motion. The substitution of the word "further" for "later" is not sufficient grounds in light of the tremendous amount of facts presented by respondent towarrant a reversal of the ruling.

[5] Finally, appellants argue that the judgment from causes 8221/ 8073 should not be used (res judicata) against them. The findings of fact and conclusions of law that were established in consolidated causes 8221/8073 are binding on the appellants. 6 Moore's Fed. Frac. 56; In Re Russell (1974), 511, Cal.Rptr. 511, 12 Cal 3d 229, 24 P. 2d 1295. First, the issue is one that would involve collateral estoppel, i.e., issue preclusion; the issue does not involve res judicata, i.e., claim preclusion. Second. it would be burdensome, if not illogical, for a court not to recognize the findings and judgment of another court on the same factual issues. Finally, the contract was void ab initio in

August 1968, and the contract remains so today.

Appellants contend that the lower court erred because it failed to recognize the numberous "defenses" that would warrant reversal of the summary judgment. In the previous discussion the basis for granting summary judgment was presented. Appellants had the burden at the time of the motion in the District Court to present material and substantial facts to oppose the granting of the motion. Naegeli v. Daniels (1965), 145 Mont. 232, 400 P. 2d 896; Harland v. Anderson (1976), 169 Mont.

- 447, 548 P. 2d 613; 6 Moore's Fed. Prac. 56.15. They failed to do this.
- [6] Appellants contend that the respondent by its actions ratified the contract and is thereby estopped from saying the contract is void. It has been held that a contract entered into without the power to contract cannot be ratified or enforced and that the incapacity to contract cannot be removed by estoppel. Granzow v. Village of Lyons (7th Cir. 1937), 89 F.2d 83.
- [7] Further, appellants argue that respondent's action is barred by laches. The respondent has been pursuing this matter since the court declared that the corporate usurpers must be ejected and the rightful stockholders must be recognized. Farmers State Bank of Conrad v. Iverson (1973), 162 Mont. 130, 509 P.2d 839. Respondent

has not failed to pursue this action in a timely manner, but was merely delayed by the actions fo the appellants and the corporate usurpers.

- [8] The final contention by the appellants is that the respondent is barred by the statute of limitations to bring this action. This is unfounded because Section 27-2-214 and section 27-2-202 MCA, hold otherwise. Also, appellants could not have expected respondent to file sooner than December 10, 1971, because the corporation was in the control of the usurpers and the degree to which the usurpers had been defrauding the corporation did not become known until well after the contract in question was entered into.
 - Issue 4: Did the District Court err in substituting the partially reconstituted coporation in place of the plaintiff receiver while the corporation remained under receivership.

[9] Appellants contend the lower court erred in substituting the partially reconstituted corporation in place of the receiver. Under section 15-2291, R.C.M. 1947 (now section 35-1-922, MCA), the District Court had the power to make the substitution. Appellants' argument is unfounded in the facts and the law.

Issue on cross-appeal: Did the District Court err in its accounting decree?

This is a suit for an accounting. It must be decided upon its own peculiar facts and circumstances which clearly distinquish it from all other authorities cited and relied upon by either party. Reickoff v. Consolidated Gas Co. (1950), 123 Mont. 555, 217 P. 2d 1076.

[10] The District Court ruled that appellants were entitled to

\$819,321.08 for the crop share and interest. The corporation argues that this is improper because the court is rewarding the appellants for their illegal action. In an accounting action, the court is sitting in equiity and can determine from the facts presented, the testimony and the circumstances which awards are the most equitable. The appellants did not act in good faith in their effort to acquire the land in question. There is little doubt that appellants knew the contract they entered into was suspect. However, they did give up something to acquire the They pambled theat the contract would never be questioned and proceeded to treat the land as their own since 1968. To deprive persons of their efforts and to say that they did not actually "keep" the farm operating efficiently and profitably during that period would also be

unfair.

- [11] A dilemma occurs as to whether appellants should be awarded for their efforts or deprived of any reimbursement for the caretaking of the farm. The District Court was proper in ruling that the appellants should receive two-thirds of the crop share, \$819,321.08, if for no other reason than it was fair and equitable. To deprive appellants the fruits of their labor for thirteen years would not be in the best interests of justice, fair play and public policy. Reickhoff, supra, does not apply as that case deals with a willful trespasser. This Court will not treat appellants as such, but will follow the rule of equity that each case stands on its own facts in an equity action. Hamilton v. Rock (1948), 121 Mont. 245, 191 P.2d 663.
 - [12] However, the District Court did err in its accounting decree

in allowing appellants the excess amounts by which the value of improvements made upon the farm exceeded the costs of such improvements. The corporation argues that the reimbursement for the improvements should be limited to the cost of those improvements and cites the Restatement of the Law, Restitution, § 42 at 42, as authority, along with various case citations in support of the Restatement. Also, the corporation contends that the rule in this state is that a willful trespasser shall receive no compensation for the improvements made and any improvements appellants made after the instigation of this action should not be compensated for. However, the corporation asked in its pleadings that appellants receive no more than the cost of the improvements. 42 C.J.S. Improvements, § 7 at 436-437, states:

"As a general rule an occupant is regarded as an occupant in bad faith and ot entitled to compensation for his improvemts, where, and only where, he either has actual notice of adverse title, or what is equivalent thereto, such as where there is brought home to him notice of some fact or circumstance that would put a man of ordinary prudence to such an inquiry as would, if honestly followed, lead to a knowledge of the adverse title. It has also been held that an occupant cannot recover if he had full means of discovering the existence of such adverse title, because in order to be in the position of a holder in good faith he must have used proper care and diligence in ascertaining the condition of the title on which he bases his claim ... " See also Fouser v. Paige (1980), 101 Idaho 294,612 P.2d 137. The discussion continues in 42 C.J.S. Improvements § 7 at 438, by stating,"... it is generally held that an accupant is not entitled to compensation for improvements made on the land after the commencement of an action in which title is disputed." From the foregoing and from the facts on hand in this matter, it would appear that appellants are not entitled to the cost of their improvments, much less the enhanced value. Appellants were aware of the questionable nature of their title, contained in the void contract and there is no question that the majority of the improvements took place after this suit had commenced. However, the corporation is asking that the credit allowed appellants be reduced by \$81,148 - that is, it does not want the entire credit removed but only the enhanced value. Since this is the amount plead, and this Court is sitting in equity on the

accounting decree, the award to appellants should be reduced from \$192,500 (enhanced value of improvements) to \$110,352 the cost of the improvements.

[13] The District Court further erred in the accounting decree by allowing appellants to retain the oil and gas income derived from the corporation farmland during the accounting period. Boumas received "title" to theoil and gas rights through the void contract. The corporation, represented by Krull and Treadaway, did not have the authority to make the original contract and therefore, did not have the authority to contract away the corporation's mineral (oil and gas) rights. This allowance must be vacated.

As so modified the judgment of the District Court is affirmed.

HASWELL, C.J. HARRISON, WEVER and MORRISON, JJ., and JACK L. GREEN District Judge, concur.

APPENDIX C

| IN THE DISTRICT COURT OF THE NINTH | | |
|---|-----------------|----------|
| JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PONDERA | | |
| * | * * | |
| LARRY. C. IVERSON, INC., |) | |
| DAME. C. IVENDON, INC., |) | |
| Plaintiff | • | No. 8500 |
| |) | |
| V | | ORDER |
| RALPH BOUMA and MRS. RALPH |) | |
| BOUMA, et al., |) | |
| Defendants | , , , , , , , , | |

Inasmuch as the Montana Supreme Court has completed appelate proceedings herein and issued remittitur, this court sat at Conrad, Montana at 9:00 o'clock, A.M. Friday, February 26th, 1982 to hear and

resolve any further questions between the parties to this litigation.

The Court had before it the Opinion of the Montana Supreme Court and additional evidence was taken in order that the Decree and Final Judgment of this Court entered September 8, 1980, as amended October 7, 1980, could be updated to reflect matters occurring since that date in a fashion consistent with the prior judgment of this Court and the Opinion of the Montana Supreme Court.

IT IS HEREBY ORDEREED that prior judgment of this Court be modified in the following respects only:

Pursuant to the Opinion of the Montana Supreme Court, the
 "Mineral Deed"purportedly issued by Larry C. Iverson, Inc. to Ralph Bouma,
 dated August 8, 1970 and recorded at Book 52, Page 103, in the records

of Deeds, Pondera County, and at Book 77, Page 157, in the records of Assignments of Oil and Gas, Toole County, is declared void ab intitio for the reasons expressed by the Montana Supreme Court in its said Opinion, and title to any mineral interests claimed by defendants thereunder are hereby quieted in Plaintiff.

2. Further, pursuant to the Opinion and remittitur of the Montana Supreme Court herein, the September 8, 1980 Order of this Court as amended by this Court's Order of October 7, 1980, is amended to show a net balance in favor of Ralph Bouma in the amount of \$44,652.00 at Paragraphs 3 and 7 on pages 9 and 10 of the September 8, 1980 judgment and interest at 10% per annum is allowed thereon to this date in the amount of \$6,545.00 making due this day the sum of \$51,197.00 in favor

of Ralph Bouma and against Plaintiff, subject however to the debits and credits allowed to the parties by agreement in a fashion consistent with the allowances made in the judgment of this Court September 8, 1980;

TO PLAINTIFF

Costs on appeal per cost bill dated January 15, 1982

\$1,331.05(included)

Landlord's 1/3 crop share crop of 1980, together with interest at 6% from Sept. 30, 1980.

Allowed for

..

..

Landlord's 1/3 crop share crop of 1981, together with interest at 65 from Sept. 30, 1981.

Oil and Gas Revenue 1980, with interest thereon at the rate of 6% per annum from Dec. 30, 1980

TO PLAINTIFF (cont'd)

Oil and Gas Revenue 1981, with interest thereon at the rate of 6% per annum from Dec. 30, 1981

Oil and Gas Revenue 1982

To Defendant, Ralph Bouma

Total to Ralph Bouma

\$213,073.52

..

..

\$ allowed for

**

**

\$191,643.48

After application of the foregoing debits and credits the court finds a balance in favor of Plaintiff for which judgment is hereby entered in the amount of \$21,430.04, said sum to draw interest at the rate of 10% per annum until paid.

The above balance in favor of plaintiff shall be paid by deduction from the funds of Escrow 92, Central Bank, which shall be paid over to Ralph Bouma as provided in paragraph 2, page 9 of the Judgment of this Court, September 8, 1980. Disbursement of Escrow 92 funds shall be made at the hour of 11:00 o'clock A.M., April 2, 1982, at the premises of Central Bank, Great Falls, Montana on condition that possession of the real estate is peacefully transferred (without prejudice to Mr. and Mrs. Bouma's rights, if any) as hereinafter provided.

Plaintiff's motion seeking to be put in possession of its lands as provided by Judgment, September 8, 1980, is hereby granted and defendant shall vacate the same at the hour of 2.00 o'clock, P.M., on April 1, 1982 in favor of plaintiff corporation or such person as said plaintiff may appoint in writing to act for it at that time and place. Until such time defendant shall keep the premises secure and protect the same from inclement weather.

The Clerk has issued an appropriate writ to the Sheriff of Pondera County in aid of enforcment hereof.

DATED this 26 day of Februay, 1982.

Leonard H. Langen
JUDGE OF THE DISTRICT COURT

APPENDIX D

| IN THE SUPREME COURT OF THE STATE OF MONTANA * * * * * * * * * * * * * * * * * * * | * | * | | | | | | | | | | | | | | | | |
|--|---|---|----|---|----|-----------|---|----|----|-----|----|----|----|----|-----|---|---|----|
| LARRY C. IVERSON, INC., | |) | | | | | | | | N | _ | Q | 2- | Ω1 | | | | |
| Plaintiff & Respondent | |) | | | | No. 82-81 | | | | | | | | | | | | |
| v | |) | | | | | (|)P | IN | 10 | N | AN | D | OR | DEF | 3 | | |
| RALPH BOUMA, MRS. RALPH BOUMA | |) | | | | | 1 | DI | SM | IS | SI | NG | A | PP | EAI | | | |
| Defendant & Appellants. | * | * | rk | * | sk | * | * | rk | rk | str | * | * | w | * | * | * | * | de |
| PER CURIUM: | | | | | | | | | | | | | | | | | | |

Pursuant to the Internal Operating Rules of this Court, this appeal is given classification No. 1 and summarily dismissed.

On November 17, 1981, this Court decided the case of Larry C.

Iverson, Inc. v. Bouma (1981), _______, 639 P.2d 47, 38 St.Rep.

1911. In that case, we partially affirmed a summary judgment issued by

the Honorable Leonard H. Langen, modifying only the court's accounting decree in accordance with our opinion. The modification of the accounting decree involved nothing more than clerical matters; no substantive or procedural decisions were involved.

After Judge Langen set the date for a hearing to modify the accounting decree, appellants filed an affidavit to disqualify Judge Langen.

Respondent then filed a writ of supervisory control with this Court seeking to set aside the affidavit and proceed with the scheduled hearing before Judge Langen. We denied the writ without prejudice and ordered the Honorable Mark Sullivan to conduct disqualification proceedings.

Judge Sullivan found no showin of prejudice or bias on the part of Judge Langen and granted respondent's motion to strike appellants' affidavit.

Finally, on February 26, 1982, a hearing was held before Judge Langen to resolve any questions arising out of the remand and modification of the accounting decree. Acting under this Court's specific instructions, Judge Langen modified the accounting decree.

The transcript of the disqualification proceedings shows the real purpose underlying Mr. Bouma's attempts to postpone the resolution of this case. In final statements before Judge Sullivan, Ralph Bouma, representing himself, stated "the real issue is yet whether or not they can take possession of my farm." (Transcript of hearing before Judge Sullivan, February 23, 1982, pg. 150)

Mr. Bouma has failed to realize that this issue was completely and finally resolved in our prior decision.

Now, on appeal, Mr. Bouma is claiming that the members of this Court as well as Judge Langen violated his rights to due process because of prejudice. Mr. Bouma has failed to show any competent evidence of prejudice or bias on the part of either Judge Langen or this Court.

Mr. Bouma is seeking nothing more than relitigation of issues already settled. We remind Mr. Bouma that the law cannot, and will not, be distorted to satisfy the personal whims of one man.

The appeal is hereby summarily dismissed as frivolous and damages in the amount of five hundred dollars (\$500.00) are hereby assessed against appellants, Mr. and Mrs. Bouma, and awarded to respondent, Larry C. Iverson, Inc., pursuant to Rule 32, MR.App.Civ,P.

DATED this 2nd day of December, 1982.

| Frank Haswell | |
|------------------|--|
| Chief Justice | |
| Gene B. Daly | |
| John C. Harrison | |
| Frank Morrison | |
| Daniel J. Shea | |

107

APPENDIX E

| * * * * | | |
|---------------|-----------------------------------|-----------------------|
|) | | |
|) | No. 82-81 | |
|) | ORDER | |
| | | |
|) | | |
| * * * * * * * | * * * * * * * * * * * * * * * * * | ric |
| |) |) No. 82-81) ORDER) |

The petition for rehearing is denied.

DATED this 16th day of December, 1982.

Frank J. Haswell
Chief Justice
Gene B. Daly

| John C. Harrison | |
|------------------|--|
| Frank Morrison | |
| Daniel J. Shea | |
| John Sheehy | |



82-1625

NUMBER A863

SUPREME COURT OF THE UNITED STATES OF AMERICA Office-Supreme Court, U.S. F I L E D

MAR 9 1983

ALEXANDER L. STEVAS,

RALPH BOUMA and MRS. RALPH BOUMA

Petitioners

VS

LARRY C. IVERSON, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF MONTANA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II

RALPH BOUMA Attorney Pro Se P.O. Box 220 Choteau, Mt. 59422 Tel:(406) 466-5374 JOHN ALBRECHT Attorney for Mrs. Ralph Bouma P.O. Box 193 Choteau, Mt. 59422 Tel: (406) 466-2621

NUMBER A863

SUPREME COURT OF THE UNITED STATES OF AMERICA

RALPH BOUMA and MRS. RALPH BOUMA

Petitioners

vs

LARRY C. IVERSON, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF MONTANA

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI VOLUME II

RALPH BOUMA Attorney Pro Se P.O. Box 220 Choteau, Mt. 59422 Tel:(406) 466-5374 JOHN ALBRECHT Attorney for Mrs. Ralph Bouma P.O. Box 193 Choteau, Mt. 59422 Tel:(406) 466-2621

TABLE OF CONTENTS VOLUME I

| ITEM | PAGE |
|--|------|
| Appendix A - Summary Judgment for Plaintiff | 1 |
| Appendix B - Iverson vs. Bouma (Mt., 1981) 639 P.2d 47 | 28 |
| Appendix C - Order | 95 |
| Appendix D - Opinion and Order Dismissing Appeal | 102 |
| Appendix E - Order | 107 |
| VOLUME II | |
| Appendix F - Findings of Fact, Conclusion of Law and Order in consolidated cases Numbered 8221/8073 | 109 |
| VOLUME III | |
| Appendix G - Memorandum in Lieu of Transcript of Hearing Held September 25, 1979 | 201 |

TABLE OF CONTENTS VOLUME III

| ITEM | PAGE |
|---|------|
| Appendix H - Order | 234 |
| Appendix I - Motion for Disqualification for Cause | 238 |
| Appendix J - Affidavit for Disqualfication for Cause | 240 |
| Appendix K - Order | 248 |
| Appendix L - Petition for Rehearing Pursuant to Rule 34, Montana Rules of Appellate Civil Procedure | 250 |
| Appendix M - Receiver's Statement to the Court (In Part) | 257 |
| Appendix N - Excerpt from Deposition of Robert Keller | 268 |

APPENDIX F

| IN THE DISTRICT COURT THE THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PONDERA * * * * * * * * * * * * * * * * * * * | | |
|---|---|----------|
| INTER DANK OF BURBLO (5 |) | |
| UNITED BANK OF PUEBLO (formerly Arkansas | , | |
| Valley Bank), a colorado banking corporation, |) | |
| Plaintiff, | | No. 8221 |
| |) | NO. OLLI |
| V | | |
| LARRY C. IVERSON, INC., a Montana Corporation GARL O. IVERSON, MABEL IVERSON, LARRY C. IVERSON, |) | |
| CONNIE FULTON, JOHN C. TREADAWAY, J. MILTON KRULL, M, DEAN JELLISON, AND FARMERS STATE BANK.a |) | |
| Montana banking corporation |) | |
| Defendants | | |

| FARMERS STATE BANK OF CONRAD, a Montana banking corporation, and STANLEY M. SWAINE, Trustee of |) | |
|--|---|----------|
| the Estates of Gilbert F. Keierleber and Irene A. Keierleber, Bankrupt |) | |
| Plaintiffs, |) | |
| Flaintills, |) | No. 8073 |
| vs | • | |
| LARRY C. IVERSON, INC., a Montana Corporation, |) | |
| et al, |) | |
| Defendants. |) | |

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause orginally came on for hearing, in Cause No. 8221, on August 12, 1969; with the consent of all parties appearing in respect to the above entitled causes, and upon motions of plaintiffs in Cause No. 8073,

the above entitled causes were consolidated for consideration and disposition thereof by this Court, sitting without a jury; by consent of all appearing parties, the record of proceedings commenced with incorporation for purposes of trial of proceedings held in Cause No. 8221 on August 12 and 13, 1969, and subsequent proceedings in Cause No. 8221, together with the consolidated proceedings adverted to, commencing with October 5, 1970, and finally concluding January 21, 1971.

Plaintiff, United Bank of Pueblo (formerly Arkansas Valley Bank) has been represented at all stages by Cresap S. McCracken, Esq., of the firm of Church, Harris, Johnson and William, and James V. Phelps. Esq., Mr. Phelps having been admitted specially for the purposes of appearances in this cause.

Farmers State Bank (defendant and cross-complainant in Cause No. 8221 and plaintiff in Cause No. 8073) has been represented at all times by Randall Swanberg, Esq., and Ray F. Koby, Esq., of the firm of Swanberg, Koby and Swanberg.

In the main, defedant John C. Treadaway has appeared pro se, although he has at different times and for different purposes been represented by attorneys M. Dean Jellison, Esa., of Kalispell, Montana, Douglas Peacock, Esq., of Phoenix, Arizona, and John Baynuk, Esq., of Shelby, Montana. Defendant J. Milton Krull has been represented by M. Dean Jellison, Esq., of Kalispell, Montana, until that attorney requested to be relieved, and was relieved by this Court, as appears in an order made October 21, 1970, reflecting action taken as of October 6, 1970.

reflecting action taken as of October 6, 1970. Since that date, Mr. Krull has appeared pro se.

Defendants Larry C. Iverson, Inc., Carl O. Iverson, Mabel Iverson and Larry C. Iverson have been represented by M. Dean Jellison, Esq., up to October 6, 1970, and such representation of Mabel Iverson (deceased) continues to the extent provided by the order of this Court made October 21, 1970.

Defendant M. Dean Jellison, Esq., an attorney, has represented himself.

Michael Bosco, Esq., an attorney of Phoenix, Arizona, was originally jointed as a party, but upon his desclaimer, he was dismissed.

Defendant Connie Iverson Fulton has appeared herein by her counsel Sandall, Moses and Cavan of Billings, Montana, but she moved the Court

for an order to be dismissed from this action, and upon the representation of her counsel that she had no interest in the outcome of this action, and there being no objection by any other party, the motion was granted during the course of proceedings.

Stanley M. Swaine, Esq., Trustee of the Estates of Gilbert F. Keierleber and Irene A. Keierleber, bankrupts, and co-plaintiff in Cause No. 8073, has been represented herein by the firm of Swanberg, Koby and Swanberg.

In addition, defendants Larry C. Iverson, Inc., Carl O. Iverson, Mabel Iverson, Larry C. IVerson, John C. Treadaway and J. Milton Krull have been represented from time to time by Douglas Peacock, an attorney of Phoenix, Arizona, Dale Keil, Esq., an attorney of Conrad, Montana,

and John Bayuk, Esq., an attorney of Shelby, Montana, though each attorney has not on all occasions represented all defendants.

In the course of the proceedings, both oral and documentary evidence was received by the Court; proposed findings of fact, conclusions of law, and briefs, as well as reply briefs, were filed; and such briefs as the parties have desired to file within the time allowed having been filed, and such proposed findings of fact and conclusions of law as the parties desired having been furnished; and the Court having been fully apprised, makes the findings of fact and conclusions of law and order, as hereinafter set forth;

For convenience, United Bank of Pueblo will be referred to as "United Bank"; Farmers State Bank of Conrad (the same as Farmers State Bank, a Montana banking corporation) and Stanley M. Swaine, will be

referred to as "Farmers Bank" and "the Trustee"; Larry C. Iverson, Inc., will be referred to as "the Corporation"; Carl O. Iverson, Mabel Iverson, Larry C. Iverson, Connie Fulton, Gilbert F. Keierleber and Irene A. Keierleber will be referred to by their first names; and John C. Treadaway and J. Milton Krull will be referred to by their last name.

FINDINGS OF FACT

1. That the correct corporate name of United Bank at the time of the commencement of Cause NO. 8221, was Arkansas Valley Bank; that since commencement of said action, the name of United Bank has been changed to and its correct corporate name is United Bank of Pueblo; that said United Bank was at all pertinent times a banking corporation organized and existing under the laws of the State of Colorado, with principal place of business at Pueblo in said State;

- 2. That at all pertinent times Farmers Bank was a Montana banking corporation, organized and existing under the laws of the State of Montana, with its principal place of business at Conrad, Montana.
- 3. That the Corporation is a Montana corporation organized and existing under the laws of the State of Montana, with its stated principal place of business at Ledger, Montana, with certificate of incorporation issued by the Secretary of State on the 17th day of July, 1964; that it was, and is, capitalized for \$500,000.00 divided into five thousand shares of a single class or common stock of \$100.00 par value each, and is organized to be govenned in its business by a board of directors consisting of three persons empowered to elect officers to perform the executive functions of the corporations; that unless other

wise specifically recited, all references to capital stock hereinafter contained, are to capital stock of the Corporation.

4. That on or about August 19, 1964, a total of 2,523 shares of stock of the Corporation were issued to the following named persons in certificates numbered and representing shares in the Corporation (hereinafter referred to collectively as the "original issue") as follows:

| STOCKHOLDER | CERT.# | NO. OF SHARES |
|---------------------|--------|------------------|
| Larry C. Iverson | 1 | 463 |
| Linda M. Iverson | 2 | 1 |
| Mabel Iverson | 3 | 58 |
| Mabel Iverson | 4 | 450 |
| Irene A. Keierleber | 5 | 300 |

| STOCKHOLDER | CERT.# | NO. OF SHARES |
|-----------------------|--------------|---------------|
| Gilbert F. Keierleber | 6 | 300 |
| Connie Iverson Fulton | 7 | 440 |
| Darrell L. Brown | 8 | 1 |
| Carl O. Iverson | 9 | 450 |
| Carl O. Iverson | 10 | 60 |
| | TOTAL SHARES | 2,523 |

5. That on or about November 22, 1965, the following certificates were issued to replace lost certificates representing share in the Corporation:

| STOCKHOLDER | CERT. # | REPLACE | NO. OF SHARES |
|---------------------|---------|---------|------------------|
| Irene A. Keierleber | 11 | 5 | 300 |
| Mabel Iverson | 12 | 3 | 58 |
| Carl O. Iverson | 13 | 10 | 60 |

That the ownership of said duplicate shares was the same as the ownership of original shares, as hereinabove set forth;

6. That about December 1964, Carl, Mabel, Gilbert and Irene individually and as officers of the Corporation, hired Krull and Treadaway as business managers for themselves as individuals, and for the Corporation; that the affairs of the Corporation have, ever since said employment to the time of appointment of receiver pendente lite in Cause 8221 (with the exception of the period of time of less than one month duration when a receiver was appointed for the Corporation in Cause 7779 of this Court) have been under the management, supervision and control of Krull and Treadaway, either as business managers or consultants, or as purported officers, directors and stockholders of the Corp-

^{*} Indicates paragraph amended by court's grant of an exception.

oration;

That on or about March 16, 1967, Farmers Bank became the owner of 450 shares of Mabel's stock of the Original Issue and 450 shares of Carl's stock of the Original Issue; that said ownership was acquired as a result of pledge of said shares by Carl and Mabel to Farmers Bank and possession of the certificates representing said shares by Farmers Bank, under date of September 17, 1964; action to foreclose said pledges reduced to judgment of this Court against Carl and Mabel authorizing foreclosure of pledges and resulting pledge foreclosure and sheriff's sale to Farmers Bank at March 16, 1967; that by reason of an agreement between Farmers Bank and the Corporation entered into between the time of the judgment of Farmers Bank against Carl

and Mabel and sheriff's sale on foreclosure, said agreement being received in evidence as Exhibit 63, the Corproation redeemed and became equitable owner of 182.7 shares of the 900 shares of Carl and Mabel pledged to Farmers Bank, as treasury shares;

8. That Gilbert and Irene were adjudicated bankrupts on or about January 24, 1966; that the Trustee by virtue of the provisions of Title 11, U.S.C. Section 110, became the owner of the said 300 shares of capital stock of Gilbert and 300 shares of capital stock of Irene; that Gilbert's said 300 shares of capital stock are subject to the pledge thereof to Farmers Bank, which holds the certificate for said shares under pledge, and the judgment authorizing foreclosure of said pledge against Gilbert in Cause 7779 of this Court;

- 9. That on July 21, 1966, at Helena, Montana, at a duly and regularly held sheriff's sale, the United Bank purchased and became the owner of all stock of the Corporation then owned by Carl and Mabel. in partial satisfaction of judgment in an action against Carl and Mabel commenced by United Bank in Cause No. 7708 of this Court; that the stock so acquired by the United Bank consisted of certificates numbered 3 of Mabel, comprising 58 shares, and 10 of Carl, comprising 60 shares; that in addition, the United Bank acquired a pledge interest owned by Carl and Mabel in certificate number 7, owned by Connie Iverson Fulton, comprising 440 shares;
- 10. That Farmers Bank, the Trustee and United Bank all made demands upon the Corporation, Krull and Treadaway for issuance of

stock certificates to them; that such demands were fruitless; that Krull and Treadaway, acting for themselves or the Corporation have never recognized the claims of Farmers Bank, the Trustee or United Bank to ownership of any stock in the Corporation;

- 11. That of the Original Issue, certificate number 2 issued to Linda M. Iverson for one share of stock in the Corproation, and certificate number 8 issued to Darrell L. Brown for one share of stock in the Corporation have been surrendered to the Corporation, and are treasury shares;
- 12. That certificate number 1 issued to Larry C. Iverson for 463 shares was pledged to Farmers State Bank, to secure a note of Larry to Farmers Bank; that prior to March 7, 1966, the Corporation redeemed said stock certificate from Farmers State Bank, and charged the cost of

redemption on the corporate books to Carl;

13. That on or about November 22, 1965, at a purported meeting of stockholdres in Phoenix, Arizona, the following persons were present: Carl, Mabel, Linda, Larry, Irene, Connie by proxie through Carl and Mabel, and Gilbert by proxies through John Savoy, a Phoenix attorney, who also purported to represent Irene and Gilbert at that meeting; Treadaway and Krull were also present as business consultants to Carl, Mabel and the Corporation; the Keierlebers objected to the meeting as being improperly called, and it was adjourned to make a determination, and then reconvened at 4:00 o'clock p.m., with Carl, Mabel, Linda, Larry, and Treadaway and Krull present, and the stock of Connie represented by Carl and Mabel; that descussion was held with respect to the disparity in

proportionate value of the property originally conveyed by Keierlebers and Iversons to the Corporation in return for paid up stock as relected in the First Issue; that a Second Issue of stock was then authorized; that on or about January 3, 1966, certificate number 18 was issued to Larry for 593 shares, certificate number 20 was issued to Carl of 657 shares, that certificate number 21 was issued to Mabel for 654 shares; that on or about March 1, 1966, certificate number 22 was issued to Carl as pledgee of Connie, for 1,009 shares; that all of these shares are referred to as the "Second Issue"; that no consideration was paid the Corportion for issuance of any shares of the Second Issue; that with the issue of certificate number 22, the maximum 5,000 shares authorized by the articles of incorporation was exceeded by 436 shares; that

directors were elected for the ensuing year, comprised of Carl, Mabel, Larry, Treadaway and Krull.

14, That on or about January 30, 1967, at a meeting of the stockholders attended solely by Carl, Krull and Treadaway at Dillon, Montana, duplicate stock certificates of the Corporation, numbers 12 and 13, were ordered cancelled and all shares of of the Second Issue were ordered cancelled; that at said meeting, a "Third Issue" was authorized, consisting of certificate number 23 to Treadaway in the amount of 1,239 shares, certificate number 24 to Krull in the amount of 1,238 shares, certificate number 25 to Carl in the amount of 60 shares, and certificate number 25 to Carl in the amount of 60 shares, and certificate number 26 to Mabel in the amount of 58 shares; that the certificates of the Third Issue which were issued to Carl and Mabel were purportedly

in Lieu of certificates representing the same number of shares of the Original Issue; that all of said stock of the Third Issue was issued without any consideration; that the meeting was not held at the principal place of business; that Treadaway and Krull owned no shares of incorporation provided for three directors of the Corporation; that the three directors of the Corporation, prior to the election of Krull and Treadaway were Larry, Carl and Mabel; that Krull first acted as a director of the Corporation on January 4, 1965, and Treadaway first signed the minutes of the Corporation as a director on November 22, 1965; that they then became the fourth and fifth directors of the Corporation; that other than the meeting on January 30, 1967, in Dillon, Montana, there has been no stockholdre's meeting of the Corporation in the State of Montana since its original incorporation in 1964;

- 15, That at all times since January 4, 1965, and November 22, 1965, Krull and Treadaway respectively, have held themselves out to be directors and officers of the Corporation;
- 16. That ownership of stock in the Corporation, including presently entitled stockholders, former stockholders, former stock certificate numbers, former number of shares and present number of shares in the Corporation, consistent with the findings herein set forth, is as described and set forth in Exhibit A annexed hereto and by this reference incorporated herein;
- 17. That at all times herein mentioned. Treadaway and Krull have acted as the managing officers of the Corporation, and as directors, and for all practical purposes, have exclusively controlled the operations of the Corporation up until the appointment of a receiver pendente lite

by this Court in November of 1970;

- 18. That no independent audit has been made of the books of the Corproation since 1965; that no internal controls have been maintained with respect to the books of the Corporation, nor any supporting receipts nor vouchers;
- 19. That since the inception of the Corporation until June 30, 1969, the gross income of the Corporation was in excess of \$715,000.00 but there is no way from the books of the Corporation to determine how much in excess of that amount the gross income was;
- 20. That other than a bank account of the Corporation commenced at the inception of the Corporation, and authorized by the directors, and long since closed, no Corporation banking account has been maintained; that all receipts of the Corporation have been deposited in over a dozen

different banking accounts in the names of either Krull, Treadaway,
Treadaway and Krull, or in the name of other corporations controlled by
Treadaway and Krull; that the funds of the Corporation were commingled
with the funds of the other corporations' or with the funds of Krull,
Treadaway, or Treadaway and Krull; that the bank accounts of the
Corporation, none of which were in the corporate name, are as follows:

- Trustee account, Montana Bank, Great Falls,
- 2. Continental Bank, Phoenix, Arizona,
- 3, Farmers State Bank, Conrad, Montana,
- 4. Trustee account in Las Vegas, Nevada,
- 5. Trustee account in the Pioneer Bank in Phoenix, Ariz.,
- 6. Acocunt under 2929 Corporation in Pioneer Bank of Phoenix, Ariz.,

- Space and Materials Corporation account in Pioneer Bank of Phoenix, Arizona,
- U.S. Pozzolan corporate account in Pioneer Bank, Phoenix, Arizona.
- 9. Central Bank of Montana, Great Falls, Montana,
- 10. First West Side Bank of Great Falls, Montana,
- Three personal accounts of Krull, one in Chicago, Phoenix and Grants Pass, Oregon,
- 12, Midland National Bank in Billings, 13 Thunderbird Bank in Phoenix (Treadaways account).
- 21. That the books of the corporation reflect that disbursements were made from said bank accounts for the Corporation, for Treadaway,

personally or otherwise, for Krull, personally or otherwise, for other individuals, personally or otherwise, and for the personal expenses of the members of Treadaway's family; that no accounting has been made available of the banking acounts referred to, i.e., other than the books of the Corporation, solely maintained by Treadaway and Krull, and there is no way to determine what has gone into the banking accounts that were used, nor what has gone out;

22. That the books and records of the Corporation cannot be successfully audited at this time, or at any of the times herein mentioned, because there is no cash account against which the cash receipts journal and cash disbursements journal can be balanced, and no corporation checking account against which such reciepts and disbursement may be balanced,

nor are there any corporate sources at which the recorded receipts and disbursements may be confirmed; two certified public accountants, utterly competent, candid and excellent witnesses, working independently and from independent accounting firms, were unable to bring the books of the Corporation into balance at any time subsequent to the opening of the books of the Corporation;

23. That Gilbert was adjudicated bankrupt in January, 1966, and Carl is, and has been, without individual assets, and is, and has been, employed as a gardener at a meagerly salary; that at the inception of the Corporation there was due the Corporation from Gilbert, Carl, and Gilbert and Carl jointly, a total of approximately \$150,000.00; that at present the accounts receivable from Gilbert and Carl individually

and jointly by various processes including advancing funds to them, assuming obligations in their behalf, or adjusting their accounts, has increased so that by June 30, 1969, Gilbert and Carl collectively owe the Corporation approximately \$425,000.00; that these accounts receivable are carried as assets on the records of the Corporation;

- 24. The Corporation had at its inceoption 5500 acres of cropland, machinery to farm the smae, and during the five-year period until June 30, 1969, enjoyed gross income in excess of \$715,000.00; that at mid-trail, in December, 1970, the Corporation was wholly without operating funds;
- 25. The Keierleber land, 1120 acres, was sold (without a stock-holder's meeting) at a loss, the loss was charged to Gilbert's account

receivable with the Corporation so that the loss is reflected in the corporate records as a corporate asset due from a bankrupt, and the loss was not then used for tax purposes;

- 26. All of the farm machinery and equipment has been sold and disposed of, with no accounting of the proceeds, and the Corporation had had to emgage in custom farming of its remaining acreage;
- 27. That in July, 1968, approximately 4500 acres of land of the Corporation (th Iverson land) was sold to Ralph Bouma on a contract for Deed (hereinafter referred to as the Bouma contract) for a pruchase price of \$734,500.00; taken in trade as part of the downpayment from Ralph Bouma was 1440 acres of land located in Teton County (hereinafter referred to as the Aguwam place) at an allowance of \$150.00 per acre;

that six weeks later the said Aguwam place was sold by Krull and Treadaway for the Corporation to the father, and brothers of Ralph Bouma at a price of \$92.50 per acre, resulting in a loss of \$82,800.00; the said relatives of Ralph Bouma sold the said Ag wam property one year later at \$120.00 per acre;

28. That pending, at the time of the Bouma contract, was a law suit by the Great Falls Iron Works against Treadaway and Krull, in Cascade County, based upon a tort and claiming compensatory and exemplary damages; that the suit primarily concerned representations made by Treadaway and Krull in the purchase of grain elevator equipment from the Great Falls Iron Works, that was erected on the Bouma contract land; that in the contract for deed with Bouma, the Corporation (i.e., Treadaway

and Krull) made reference to the suit of the Great Falls Iron Works, as a lien in the amount of \$24,328.00, which the Corporation would pay, or would give credit to Bouma on his payments, if he were stuck with the loss; that Treadaway and Krull negotiated a settlement with the Great Falls Iron Works by the return of the removable grain elevator equipment for a credit of \$14,328.00, and by promising to pay for a credit of \$14,328.00 and by promising to pay \$10,000.00 additional over a three-year period out of the receipts from the Bouma contract for deed; that in order to get the removable grain elevator equipment from the Bouma contract land, the Corporation (Treadaway and Krull) gave credit to Bouma on the contract of the amount of \$24,328.00;

* That the Bouma contract, after the downpayment, assumptions of mortgages, etc., went into excrow with the Central Bank of Montana, with \$333,830.07 to be paid, with interest at the rate of 5 per cent per annum from and after September 1, 1968; that the contract for deed and the escrow agreement both provided that 22 percent of this blaance was to be paid to Treadaway, 22 percent to Krull, and 56 percent to the seller; that the 44 percent to be paid to Treadaway and Krull was represented by Treadaway and Krull, in their testimony, and in the contract for deed, to be in satisfaction of a morgage by the Corporation to them in the mount of \$125,000.00; that no where in the books of the Corporation is there any reference to the \$125,000.00 mortgage or debt, or its satisfaction;

^{*}Indicates paragraph amended by court's grant of an exception.

- That the Bouma contract is being paid in annual payments, to the escrow agents, the Central Bank of Montana; that these Bouma payments have been subjected to some ten assignments to various persons holding notes executed by Krull and Treadaway for the Corporation; that some notes run to attorneys for services, rendered primarily in representing Carl and Mabel as individuals, and not limited to services rendered the Corproation; some notes are for obligations assumed by the Corporation; some notes are for obligations assumed by the Corporation for Carl and Mabel; and as of the date of these finds the unpaid total of these assignments is in excess of \$50,000.00.
- 31. Richard and Earl Milan performed work on corporate property at Ledger, Montana, for which they were not paid, and for which they

filed wage claims in the amount of \$1,770.00; the Corporation did not defend the wage claims, and judgment was obtained, and satisfied by the Corporation in 1968 for \$2,700.00; Treadaway and Krull were managing the Corporation throughout the entire transaction;

- 31. Gilbert took bankruptcy on January 24, 1966, Treadaway and Krull filed personal claims against Gilbert, but caused no claim to be filed by the Corporation, although the Corporation then claimed \$248,000.00 due from Gilbert, and \$119,000.00 due from Gilbert and Carl;
- 32. As of June 30, 1969, the books of the Corporation reflected 5000 shares of Gold Reserve mining stock as an asset of the Corporation; it was transferred to the Corporation in the name of Treadaway and Krull, and was never retransferred by Treadaway and Krull to the

Corporation; it is not now listed on the corporate books at all, nor is any reason assigned for its absence;

- 33. The Gulick-Treadaway Foundation account has been carried as an asset of the company for four years, in the amount of \$20,000.00; it does not exist;
- 34. Space and Materials Company is reflected in the corporate bookds as an account asset of \$91.88; it is a defunct Arizona corporation, and the account should have been deleted and has not been;
- 35. "2929 Corporation" has \$6,100.00 invested in it by this

 Corporation, and is carried as an asset in that amount of the Corporation;

 Treadaway is president, Krull is secretary treasurer; it is defunct;
- 36. U.S. Possolan, a Nevada Corporation, with Treadaway as vicepresident and Krull as secretary-treasurer, owes this Corporation 43,492.78, but this corporation has no evidence of indebtedness;

- * 37. That in May of 1969, Treadaway and Krull agreed to sell the Corporation's Rieman proeprty to Dr. Donald Fletcher of Conrad, and received a down-payment of \$2,000.00; \$1,000.00 for the down-payment was by check, May 9, 1969, payable to Treadaway and Krull, and cashed at a safeway store in Arizona; a second check of \$1,000.00, July 9, 1969, was payable solely to Krull, and was deposited in a bank account of Krull's; Fletcher has received no deed nor the \$2,000.00; Treadaway and Krull subsequently entered into an agreement to sell the Rieman land to Arnold Rohrer:
- 38. That in December, 1969, Treadaway and Krull entered into a lease with Arnold Rohrer of the gravel on the Rieman land, and at the same time, entered into a contract for the sale of this land to Arnold * Indicates paragraph amended by court's grant of an exception.

Rohrer; the contract, exhibit number 38, states that Krull and Treadaway claim jointly and severally an assignment of tax deed interest superior to that of the Corporation; they paid the taxes, as reflected in exhibit number 39, in their own names or in the name of Krull, at a time when they were the managers of the Corporation, and they received a tax deed to the property; they received in excess of \$19,000.00 for this property, which is now gone; the lease of the gravel and the sale of the land was conducted subsequent to the injunctive order of this Court;

39. TCK Corporation, is a Nevada corporation, in which
Treadaway and Krull have a two-thirds interest, and this Corporation
has a one-third interest; the corporate books reflect the Corporation

owed TCK \$2,480.39; TCK sold land in Nevada for \$3,000.00 in cash, of chich \$250.00 was put in a joint account of Krull and Treadaway, and \$2,000.00 went to Krull and was charged against his management contract with this Corporation; the only remaining assets of TCK are a car and a pickup; the car is a 1966 Lincoln, kept in a garage at Treadaway's house, and the truck is used on Treadaway ranches in Arizona; TCK has no property in Arizona other than the car and the pickup; 40. Treadaway and Krull agreed to sell corporate real estate property near Cutbank, Montana, to Herman Bouma in December of 1969, receiving at the time the sum of \$1,000.00, as a down payment thereon; \$25.00 was paid to the Federal Land Bank on behalf of the Corporation, and the rest was put in a joint banking account of Treadaway and Krull

^{*} Indicates paragraph amended by court's grant of an exception.

this was subsequent to the injuctive order of this Court forbidding transfer of property;

- 41. That when the Corporation sold the Iverson land, as aforesaid, to Ralph Bouma (4520 acres), on a contract for deed, in July 1968, the Corporation reserved the mineral rights; a deed to the mineral rights was given to Ralph Bouma on August 8, 1970, for which the Corpration received a credit of \$4,520.00, the total price; Ralph Bouma forthwith leased the property to Henry Tower at a dollar and acre per year, i.e., Ralph Bouma leased the mineral rights for one year for as much as he paid for the whole grant; this transfer was also made subsequent to this Court's injunctive order restraining any such transfers:
 - 42. That the Agawam land, received as a part of the down-payment

on the Bouma contract for deed, was sold for \$133,200.00 plus \$3,590.00 of Federal Land Bank stock, in September, 1968; Treadaway and Krull paid out \$3,250.00, \$2,000.25 in taxes, \$14,100.00 on a mortgage to Capp Homes, and \$71,800.00 to Federal Land Bank; there was a net remaining of \$45,639.45 in cash, part of which was put in the Central Bank of Montana under Krull's name, and part of which was put in the Phoenix Bank under Treadaway's name; it is all spent now;

43. Treadaway and Krull sold the Keierleber property near Brady, Montana, to Keith and Wilma Dory in February 1967; they carried the land on the books at \$153,910.02 and the buildings at \$34,179.29 for a total of \$188,089.31; they sold it for \$130,000.00; there was no meeting of stockholders to authorize the sale; there were 1100 acres

involved, and the land sold for \$118.18 per acre; the corporate books reflect that \$23,910.02 was charged back to Keierleber as the difference between the land and the sale price, on the basis that he overinflated the value when he put the land in the Corporation, and the building loss, amounting to \$5,965.52, was similarly charged back to Keierleber; Keierleber had taken bankruptcy in January, 1966; the carge back to Keierleber had been carried as a corporate asset;

- 44. The corporate stock is not listed on any stock exchange, nor on any markets; the original stockholders were the Iversons and the Keierlebers plus a daughter-in-law of the Iversons, and Darrell Brown, the CPA, the latter two holding one share of stock each;
- 45. Farmers State Bank is the only bank where the Corporation is authorized to bank, under resolution of August 19, 1964, which had never

been amended;

- 46. There was no stockholders meeting authorizing the sale of the Iverson property to Bouma, the Dory Sale, the Agawam sale, or the Cutbank sale;
- 47. That a meeting of stockholders was called for January 30, 1967, at Dillon, Montana, as aforesaid; that Krull was asked on the witness stand if he were sware of the United Bank's claim against the stock of Carl and Mabel at the time of the meeting in Dillon, and refused to answer the question on the grounds that the answer would tend to incriminate him in a felony;
- 48. That on October 20, 1969, the Corporation loaned \$500.00 to Gilbert; that Gilbert had taken bankruptcy in January of 1966; and on October 20, 1969, the books of the Corporation reflect that Gilbert

was indebted to the Corporation in the amount of \$248,000.00;

- 49. That Farmers State Bank became a stockholder as a result of foreclosure on March 16, 1967, requested of the Corporation a statement of affairs on March 26, 1967, gave notice to the Corporation of the status of Farmers State Bank on March 27, 1967, and made demand for a stockholders meeting on juner 21, 1967;
- 50. That the interest on the Bouma contract for deed was precomputed over the life of the contract at \$214,484.60, and is carried as an asset on the books of the Corporation as an account receivable; that by the terms of the contract for deed itself, 44 percent of the proceeds, including the interest, goes to Treadaway and Krull, and not to the Corporation;

- 51. That the financial sheet of June 30, 1966, of the Corporation with a balance sheet and profit and loss statement, reflects management fees to Treadaway and Krull of \$57,718.58, which brought the management fees current; that Treadaway and Krull caused to be issued to themselves, in January 1967 in Dillon, under the "Third Issue" of stock, almost half the stock in the Corporation, for management services; that this would be for six month's work:
- * 52. That Treadaway and Krull purported to cancel the 118 shares owned by Carl and Mabel, in June, 1970, after this action was commenced, and after this Court had ruled in August of 1969 that United Bank had acquired these shares at sheriff's sale; that the cancelation is a notation of the stock transfer book; that there are no minute entries reflecting the cancelation of the shares, i.e., no board meeting;

^{*} Indicates paragraph amended by court's grant of an exception.

- 53. That the corporate stock book stubs reflect a written lien in favor of the Corporation on the 118 shares of stock of Carl and Mabel, pursuant to Section 15-642, R.C.M. 1947; that Section 15-642, RCM. 1947, was repealed in 1963, prior to the inception of this Corporation;
- 54. That the effort to cancel stock at the Dillon meeting in Janaury, 1967, would have canceled stock upon which there were attorney's pledges, the sheriff's execution to United Bank, the Trustee in Bankruptcy in the Keierleber estate, and the stockholders themselves, Mabel, Connie, and Larry, without notice nor authorization;
- 55. That on August 31, 1966, the Corporation assumed a debt of Carl to Farmers Bank of \$86,794.42; that there were expenses of over \$8,000.00 (legal fees) also paid by the Corporation, but not charged to Carl; this \$86,794.42 was then, and still is, reflected as an asset of the Corporation;

- 56. That the minutes of a special meeting of the stockholders held on August 19. 1964, specifically state that the stock by the new subscription into this Corporation and by the transfer from the now dissolved Carl Iverson, Inc., Corporation, in amounts as held and by the same holders as in that corporation now total as shown thereunder, and constitutes a total issue, namely, 2523 shares of stock, (referred to here as the Oringinal Issue); that Darrell Brown advised Carl at that time of the disproportion between his shares and the assets he put into the corporation, and Gilbert's shares and the assets he put into the Corporation;
- 57. That up to June 30, 1969, the cash withdrawals of the Corporation reflect that Treadaway received \$152,283.94, Krull received \$65,070.46

\$88,577.54 went to one or the other or both, and the wife of John Treadaway received \$9,753.50, a total of \$315,685.44 (see exhibit 55D and 55D-26); that Treadaway and Krull withdrew an additional \$40,615.33 from July 1, 1969 to December 31, 1969; there is no entry in the minute of the Corporation establishing any salary to Treadaway or Krull;

- 58. That exhibit number 55F reflects the management expenses; that many of the expenses are self-explanatory, and had nothing to do with the Corporation, e.g., sehedule number 2, page 3, line 2, check to the Arabian Horse Association; that no rebuttal was made to this exhibit;
- 59. That exhibit 74 reflects the expenses incurred by the Corporation for traveling, under interstate operating account; that the unrebutted

testimony was that it is unusually large for a farm operation; that the expenses incurred as reflected therein are not suported by documents just one-line motations, e.g. line 11 of page 3 of the exhibit reflects "10-30-65 CD-7" with the amount of \$10,167.37... at the cash disbursements journal at that page, it shows it was spent, but by whom nor to whom, only that it was from the Corporation; that the total amount in five years is \$21,757.58;

60. That exhibit number 81 reflects the schedule of capital surplus, and under credits to capital surplus reflects a total of \$303,841.15; that the undisputed testimony is that none of these items belongs under capital surplus; that exhibit number 82 reflects the compensation paid to Krull and Treadaway, and under total cash and

officers salary reflects \$196,748.55; they also received, or will receive, 44 percent of the Bouma contract for deed (\$333,830..07) which comes to \$146,885.23 plus interest; they also received 2477 shares of corporate stock at par, or \$247,700.00; (they have not received anything under the Bouma contract, as yet, and the stock issued to them was invalidly issued) the \$196,748.55 was also included in plaintiff;s exhibit 55D and 55D-26, reflecting total cash withdrawals, heretofore mentioned;

61. That the Corporation had a claim against the Marshall land and Cattle Company in Colorado; the the Marshall Land and Cattle Company went into bankruptcy, and a claim was filed on behalf of the Corporation by Treadaway and Krull; that this claim was originally carried on the books of the Corporation in the approximate sum of \$30,000.00 as a

"right of contribution", was subsequently increased by approximately another \$30,000.00, and is now carried in the amount of \$92,313.47, from which \$7,500.00 has been recovered; that the balance of \$84,913.47 is reflected as an asset of the corporation; that there is no possibility of any recovery by this Corporation;

- 62. That exhibit number 79, unrebutted, reflects a total income of \$715,217.06 by the Corporation, and net losses of \$124,526.63, or a net income of \$590.690.43, from August 17, 1964, through June 30, 1969;
- 63. That exhibit 83 reflects the net asset value of the Corporation available to the stockholders on June 30, 1969, and is unrebutted; that it reflects the book value of assets on theat date at \$948,034.12 from which is deducted the amounts due from Gilbert, Carl, and Gilbert and Carl, in the amount of \$424,968.17 as uncollectable, deducts the right

of contribution on the H.C. and Cora Marshall land of \$84,813.47 as impossible to recover, deducts the 44 percent of the Bouma contract that has been given to Krull and Treadaway in the amount of \$146,885.23 deducts the asset valuations assigned to Space and Materials, 2929 Corporation, U.S. Pozzolan, Gulick-Treadaway Foundation, and Gold Reserve mining stock, in the total amount of \$30,211.26, as worthless assets, deducts an itemized list of remaining liabilities to third parties in the total amount of \$100,340.63; that the net assets of the Corporation available to stockholders on Juner 30, 1969, is \$160,815.36; that the same exhibit approaches the net asset value of the Corporation available to stockholders on June 30, 1969, from another direction, i.e., by recapitulation of the remaining assets; that the net asset value comes out the same, \$160,815.36; that the difference between the book value and the true value of the corporate assets on June 30, 1969, is \$787,218.76;

- 64. That the Corporation filed a claim in bankruptcy of the Marshall Land and Cattle Company in Pueblo, Colorado; that the claim was filed on behalf of the Corporation by Treadaway and Krull; that Krull testified that he spent three to four months there, in Pueblo Colorado, on behalf of the Corporation, and many, many hours; that in response to inquiry, he testified that he does not know the result of his actions, nor that of his attorneys with respect to the claim;
- 65, That United Bank incurred \$140.00 expense in bringing a witness from Pueblo, Colorado, to prove its name and corporate existence; that defendant John Treadaway refused to admit these facts, upon

request; that defendant Treadaway had inquired into these matters prior to the hearings; that defendant Treadaway offered no proof to the contrary;

CONCLUSIONS OF LAW

1. That the correct corporate name of United Bank at the time of the commencement of Cause No. 8221, was Arkansas Valley Bank; that since commencement of said action, the name of United Bank has been changed to and its correct corporate name is United Bank of Pueblo; that said United Bank was at all pertinent times a banking corporation organized and existing under the laws of the State of Colorado, with principal place of business at Pueblo in said State;

- That at all pertinent times Farmers Bank was a Montana banking corporation, organized and existing under the laws of the State of Montana, with its principal place of business at Conrad, Montana;
- 3. That the Corporation is a Montana Corporation organized and existing under the laws of the State of Montana, with its stated principal place of business at Ledger, Montana, with certificate of incorporation issued by the Secretary of State on the 17th day of July, 1964; that it was, and is, capitalized for \$500,000.00 divided into five thousand shares of a single class of common stock of \$100.00 par value each, and is organized to be governed in its business by a board of directors consisting of three persons empowered to elect officers to perform the executive functions of the corporation; that unless otherwise specifically recited, all references to capital

^{*} Indicates paragraph amended by court's grant of an exception

stock hereinafter contained, are to capital stock of the Corporation that said corporate stock is not listed on any stock exchange, nor on any markets, and is not a stock commonly recognized as a medium for investment;

4. That on or about August 19, 1964, a total of 2,523 shares of stock of the Corporation were issued to the following named persons in certificates numbered and representing shares in the Corporation (hereinafter referred to collectively as the "oringal issue") as follows:

| STOCKHOLDER | CERT. # | NO. OF SHARES | |
|------------------|---------|------------------|--|
| Larry C. Iverson | 1 | 463 | |
| Linda M. Iverson | 2 | 1 | |
| Mabel Iverson | 3 | 58 | |
| Mabel Iverson | 4 | 450 | |

| STOCKHOLDER (cont'd) | CERT. # | NO. OF SHARES |
|--------------------------|------------|---------------|
| Irene A. Keierleber | 5 | 300 |
| Gilbert F. Keierleber | 6 | 300 |
| . Connie Inverson Fulton | 7 | 440 |
| Darrell L. Brown | 8 | 1 |
| Carl O. Iverson | 9 | 450 |
| Carl O. Iverson | 10 | 60 |
| To | tal Shares | 2,523 |

5. That on or about November 22, 1965, the following certificates were issued to replace lost certificates representing share in the Corporation:

| STOCKHOLDER | CERT. # | ISSUED TO REPLACE | NO. OF SHARES |
|---------------------|---------|-------------------|---------------|
| Irene A. Keierleber | 11 | 5 | 300 |

| STOCKHOLDER (cont'd) | CERT. # | ISSUED TO REPLACE | NO. OF SHARES |
|----------------------|---------|-------------------|------------------|
| Mabel Iverson | 12 | 3 | 58 |
| Carl O. Iverson | 13 | 10 | 60 |

That the ownership of said duplicate shares was the same as the ownership fo original shares, as hereinabove set forth;

- 6. That the one share each of stock of Linda Iverson and Darrel Brown have been surrendered to the Corporation and are treasury shares;
- 7. That the 463 shares of stock of Larry C. Iverson were pledged to Farmers State Bank, and redeemed by the Corporation prior to March 7, 1966, and retired as treasury stock; that the 600 shares of stock issued to Irene and Gilbert Keierleber were transferred to Stanley M. Swaine, as Trustee in Bankruptcy on January 24, 1966,

subject only to a pledge of Gilbert's 300 shares to the Farmers Bank; that certificate number 4, in the amount of 450 shares to Mabel, and certificate number 9, in the amount of 450 shares to Carl, were pledged to the Farmers Bank, and as a result of the pledged foreclosure, Farmers Bank became the owner of those 900 shares on or about March 16, 1967, subject to a redemption, by the Corporation of 182.7 shares, which were then retired as treasury stock, leaving the Farmers Bank 717.3.

* 8. That Connie Iverson Fulton is the owner of 440 shares, subject to a pledge to Carl and Mabel for the purchase price of said shares, which pledge was purchased by the United Bank, along with certificate number 10, for 60 shares to Carl, on July 21, 1966, at Helena, Montana,

^{*}Indicates paragraph amended by court's grant of an exception.

at a duly and regularly held sheriff's sale;

- 9. That the legal entities entitled to ownership of stock in the Corporation, having succeeded to ownership of the 2,523 stock issued by the Corporation in 1964 (the Original Issue) and the number of shares to which each legal entity is entitled, are as set forth in Exhibit A annexed to these finds of fact and conclusions of law, which exhibit is incorporated herein as fully as though set forth herein at length;
- 10. That the stock in the Corporation issued during 1966, as the Second Issue, is void, as being invalidly issued, for the reason that there was no consideration given for the Second Issue; that the Second Issue was in fraud of the rights of owners of successors in

interest of of the Original Issue, and in particular, in violation of the rights of Stanley Swaine as Trustee in bankruptcy and owner of the shares of stock of Gilbert and Irene, and in violation of the rights of Farmers Bank as a pledgee of many of the shares of the Original Issue; that whatever disproportionate issue resulted in the Original Issue of stock, the facts were then known to the parties who subscribed to that Original Issue, presumably accepted by all of them, and the recourse, if any, would only be to call in shares of stock issued to Gilbert and Irene, as being without adequate consideration, and not to issue additional stock to Carl and Mabel;

11. That the Third Issue of stock, at the Dillon meeting in Janaury, 1967, was void, for the reason that the issue was again

consideration, was in fraud of the rights of owners of successors in interest of stock or the original issue, and the stockholders meeting at which the issue was authorized was invalidly called in that notice to all stockholders was not given, the meeting was not held at the principal place of business, and the only stockholder present had no stock that was not pledged;

12. That the assets of the Corporation have been misapplied and wasted by Krull and Treadaway, whose acts as persons in control of the corporation have been illegal and fraudulent; that they represented themselves to the directors fo the Corporation as business and management consultants, when they knew that they were not qualified as such, or knew that they did not know if they were qualified as such; that they have caused the funds of the Corporation to be commingled

with their own personal accounts; that they have kept no accurate records of the Corporation, no internal controls, and have required no audit of the books for over five years; that they have withdrawn funds from the corporation to pay for debts owing to them from stockholders, and assigned the claim against the stockholders to the Corporation, as an asset of the Corporation, knowing that the asset was worthless, and knowing that the Corporation cannot make loans to a stockholder; they have acted as directors of this Corporation when the articles of corporation limited the number of directors to three, who have always been Larry, Carl and Mabel; that in addition to adding themselves to the board of directors, in excess of the number of directors that the Corporation could legally have, all stockholders

meetings, after the inception of the Corporation have been out of the State of Montana, i.e., illegally held, and as a consequence, the stockholders could not legally elect any further directors, much less Treadaway and Krull; that they have caused themselves, along with Carl, to be appointed by the stockholders as the "executive" committee, without authorization from the articles of incorporation, and they have conducted all of the affairs of the corporation, with or without stockholders consent or knowledge that they have sold, or contracted to sell, all of the assets of the Corporation without stockholder consent; that they have carried worthless assets on the books of the Corporation for the purpose of inflating the book value of the Corporation; that they have diverted funds from the Corporation into other corporations,

were principally owned and controlled by Treadaway and Krull, for no valid consideration; that they have failed to pay legitimate debts of the Corporation, thereby jeopardizing the assets of the Corporation or causing the debt to be increased as a result of legal action, and they have caused to be assumed by the Corporation debts of individuals which are not obligations of the Corporation, and these debts are principally those of stockholders, which is contrary to the law prohibiting loans to stockholders; at the Corporation's inception, it was a solvent, going concern, with income-producing assets worth approxiamtely \$1.4 million, but during the approximatley five years of the administration of the affairs of the Corporation by Treadaway and Krull, the Corporation's assets have shrunk by approximately \$1.2 million through losses, poor management, withdrawals and misappropriation of assets, by Treadaway and Krull, and this does not include \$715,000.00 of gross profits, at least, received by the Corporation;

- 13. That the compensation received by Krull and Treadaway for their services as managers, officers or directors of the Corporation is wholly in excess of and disproportionate to the value of any services rendered by them to the Corporation; that in view of the misapplication and waste of assets and the illegal and fraudulent acts of Krull and Treadaway, their services to the Corporation are not only deemed to be valueless, but well deserve the attention of a grand jury;
- * 13-A. That the attempt of Teradaway and Krull to reserve to them-

^{*}Indicates paragraph inserted by grant of Rule 59 motion

selves from the Bouma Contract (described at paragraphs 27, 28, 29, 30, 41 and 50 of the findings of fact) 22% each, for a total of 44% of sums payable upon the Bouma contract (as described at paragraphs 29 and 50 of the finings of fact), in respect of the sale of land belonging to the Corporation is unlawful, void, and Krull and Treadaway should be adjudged as having no interest therein;

- 14. That the defendants Treadaway and Krull are exceptionally likable and personable, courteous to the Court, and a pleasure to have in court; that their testimony is totally incredible and unworthy of belief;
- 15. That the United Bank, the Farmers Bank, and the Trustee are entitled to allowance of an attorneys fee, and reimbursement of their

costs and expenses including costs advanced by United Bank for the Receiver pendente lite, payable from the assets and funds recovered for the Corporation for the benefit of the stockholders of the Corporation; that the Court should reserve and retain jurisdiction herein for the purpose of determining in subsequent proceedings at an appropriate time the nature extent and values of such assets and funds recovered and the reasonable amount of the attorneys fee, costs and expenses allowable to United Bank, Farmers Bank and the Trustee;

. 16. That the defendant, John C. Treadaway is specifically liable to the United Bank in the sum of \$140.00 to defray the cost of bringing to Montana witness Arlo Beeman from Pueblo, Colorado, whose trip to Montana was required due to the unreasonable refusal of said defendant to make admission of the name and existance of plaintiff, United Bank

of Pueblo;

- 17. That it is necessary and proper that a receiver be appointed to wind up the affairs of the Corporation for the purpose of accomplishing liquidation and dissolution with all deliverage speed according to the procedures established in Title 15, RCM, 1947; that after the receiver appointed hereunder has had an opportunity to ascertain the nature and extent of the assets which may be recovered for the Corporation and the nature and extent of liabilities of the Corporation. the question of liquidation and dissolution may be reviewed, prior to its accomplishment if, in the light of the receiver's findings, it is more reasonable not to liquidate nor dissolve the Corporation;
- 18. That the Corporation should be placed in receivership, and the appointment of George Campanella previously appointed as receiver

pendente lite should be confirmed and continued as the receiver of the Corporation; that the receiver should meet with the stockholders for the purpose of ascertaining and complying with their requests, consistent with the orders of this Court;

19. That an order should issue in accordance with these conclusions.

ORDER

From the foregoing findings of fact and conlcusions of law, IT HEREBY ORDERED as follows:

1. That title to the stock of Larry C. Iverson, Inc., be and hereby is quieted in the following manner, to wit:

| STOCKHOLDER | SHARES | |
|-----------------------|--------|--|
| UNITED BANK OF PUEBLO | 118 | |

| STOCKHOLDER | SHARES |
|--|--------|
| CONNIE IVERSON FULTON (subject to pledge to the United Bank of Pueblo for the purchase price at par value of \$100.00 per share) | 440 |
| FARMERS STATE BANK OF CONRAD | 717 |
| STANLEY M. SWAINE, as Trustee in Bankruptcy of the Estate of Mabel Keierleber | 300 |
| STANLEY M. SWAINE, as trustee in Bankruptcy of the Estate of Gilbert Keierleber, (subject to a pledge to the Farmers State Bank of Conrad) | 300 |
| LARRY C. IVERSON, INC., (as treasury stock) | 648 |
| Total | 2,523 |

^{2.} That upon distribution of the assets of Larry C. Iverson, Inc.,

among stockholders, the pledges shall be honored, at the time of distribution.

- 3. That Larry C. Iverson, Inc., is placed in receivership and the appointment of George Campanella previously appointed receiver pendente lite, is confirmed and continued as the receiver of Larry C. Iverson, Inc., with his bond in the amount of \$25,000.00 to be continued, and increased as the need should arise.
- 4. That the receiver is directed to gather together and take into custody the assets of Larry C. Iverson, Inc., entertain claims of creditors of Larry C. Iverson, Inc., publishing notice thereto as in the case of a probate estate, and he is directed to do all things necessary and desirable to effect the windup of the affairs of Larry

- C. Iverson, Inc., including, but not limited to, such action as may be required to recover monies misappropriated from the Corporation by defendants Treadaway, Krull, Carl O. Iverson and Larry C. Iverson. He shall report his activities in narrative form to this Court, with a copy to all stockholders, at intervals of not to exceed 90 days.
- 5. This Court having adopted the form and procedure used in the case of probate estates with respect to publication of notice to creditors and this Court having all matters to do with Larry C. Iverson, Inc., within its jurisdiction, it is ordered that such creditors as may fail to prefect their claims by filing them with the receiver within the time limited by law for filing as in the case of probate estates shall be barred and enjoined by this Court from ever after

raising such claim or claims. It shall be the duty of the receiver to petition the Court for such injunction orders at the appropriate time providing to any known creditors who are the subject of such petition, notice of the filing thereof, with leave to respond not later than 20 days after receipt of such notice.

6. Defendants John C. Treadaway, J. Milton Krull, Carl O. Iverson and Larry C. Iverson are removed and ejected from all positions or claims thereof on the board of directors of Larry C. Iverson, Inc., and from any offices they might have or claim in Larry C. Iverson, Inc., and they and each of them are hereby permanently restrained and enjoined from acting or interfering in any manner or matter whatever in the affairs of Larry C. Iverson, Inc. Any and all stock certificates

outstanding in their names are, by these presence, declared to be null, void, and of no force or effect whatever.

- 7. That the receiver is directed to issue stock certificates to those entitled thereto under the terms of this order, noting on the face thereof that such certificates are issued by him as receiver pursuant to this order, and subject to all terms and qualifications herein contained.
- 8. That the final decision as to the ultimate dissolution and distribution of the assets of Larry C. Iverson, Inc., among its stockholders is reserved by this Court until the receiver shall have had a reasonable time within which to put the affairs of the Corporation into order.
 - 9. The jurisdiction of this Court is continuing and will continue

for the purpose of administration of the windup of the affairs of Larry C. Iverson Inc., and the interested parties may petition from time to time as matters may require.

- 10. That defendant John C. Treadaway is directed to pay United Bank of Pueblo the sum of \$140.00 to defray the cost of bining to Montana witness Arlo Beeman from Pueblo, Colorado, but the liability of defendant John C. Treadaway to the Larry C. Iverson Inc., corporation is neither affected nor determined by the payment of this amount.
- 11. That United Bank of Pueblo, the Farmers State Bank of Conrad, and Stanley M. Swaine, are entitled to an allowance of an attorney fee, and reimbursement of their costs, and expenses payable from the assets and funds recovered for the Corporation; that the Court

reserves and retains jurisdiction herein for the purpose of determining in subsequent proceedings at an appropriate time, the nature extent and value of such assets and funds recovered, and the reasonable amount of the attorneys fees and expenses allowable; that a petition to that effect may be filed herein at any time hereafter by United Bank of Pueblo, Farmers State Bank of Conrad, or Stanley M. Swaine.

12. That the receiver, and the attorneys for the United Bank of Pueblo, the Farmers State Bank of Conrad, and Stanley M. Swaine, as officers of this Court, are ordered and directed to confer with the County Attorney of Pondera County with respect to reproducing the proof adduced in these proceedings tending to show the violations, by any persons, of Section 94-2101, et sea., RCM, 1947, and 94-2701, RCM, 1947,

and to that end, in the event that a transcript of these proceedings is made, for any reason, the receiver is authorized and directed to cause a copy of the transcript of these proceedings to be made to be delivered to the County Attorney of Pondera County.

** 12-A. That John C. Treadaway and J. Milton Krull have no right, title or interest in, to or under the Bouma contract in the findings of fact and conclusions of law herein described, and purported interest therein being unlawful and void as to said parties; that said defendants do not now have nor were they ever entitled to reserve and receive any proceeds from the Bouma contract; said defendants are hereby divested of any interest in and to said contract or the proceeds thereof and said defendants are liable to the Corporation for any sums received by

^{**} Indicates paragraph inserted by grant of Rule 59 motion.

said defendants as and for payment of any amounts reserved to them under the terms of said Bouma contract.

13. That as to all matters not of a continuing nature for the purpose of administration of the receivership, this order is a judgment, and is final upon entry.

DATED: April 17, 1971.

Robert S. Keller
District Judge

186

EXHIBIT A

| Presently Entitled Stockholder | Former Stock- holder | Former * Cert. Number | Former No. of Shares | Present No. of Shares |
|---|----------------------------|-----------------------------|----------------------------|-----------------------------|
| | Mabe1 | (4) | 450 | |
| | Carl | (9) | 450 900 | |
| | Less Treasury Shares | | 182.7 | |
| Farmers Bank | | | | 717.3 |
| The Trustee (Subject to Farmers Bank pledge judg. v. Gilbert) | Gilbert | (6) | 300 | 300 |
| The Trustee | Irene | (5,11) | 300 | 300 |
| United Bank | Mabel | (3,12,26) | 58 | 58 |

^{*} In "Former Certificate No." column, where several numbers are included within the same brackets, they represent the various alleged duplicate issued certificates, all treated as being the same shares out of the

| Exhibit A cont'd | | | | |
|---|-------------------------------------|------------|-------|---------|
| United Bank | Carl | (10,13,25) | 60 | 60 |
| Connie (subject to pledge to United Bank) | Connie | (7) | 440 | 440 |
| Total presently or | itstanding shares | | | 1,875.3 |
| Treasury Shares | Carl/Mabel | (4) (9) | 182.7 | 182.7 |
| Treasury Shares | Linda | (2) | 1 | 1 |
| Treasury Shares | Darrell Brown | (8) | 1 | 1 |
| Treasury Shares | Larry | (1) | 463 | 463 |
| Total outstanding comprising total | shares and Treasur orginal issue | y shares, | | 2,523 |

MEMORANDUM:

The question of receivership has not been legitimately in doubt by this court since the opening days of hearings in October, 1970, when the defendants Treadaway and Krull testified to the commingling of funds in bank accounts, along with the total lack of internal controls or The subsequent proof showing that a corporation valued at \$1,400,000.00 (admittedly, a part of this valuation would be Carl's own estimate of the value of the lands, but subsequent sales did not show this estimate to off by any material amount), that was functioning as a money-making farm operation, reduced to one final asset, the Iverson land, which had been sold, with almost half of the sale proceeds to go to the managers, and over \$50,000.00 of the remaining proceeds

already assigned to creditors, not to mention the fact that of the four original principal incorporators, two were in bankruptcy, one died in poverty, and one was working as a gardener for an apartment house in Phoenix, Arizona, at a meagerly salary, was overwhelmingly sufficient to show not only the need for a receivership, but its questionable in the Court's mind as to whether or not the receivership does not come too late.

It may well be that Treadaway and Krull were in good faith; I just don't believe it. It is incredible to me that men as accomplished as they were could keep books of a corporation of this size in such miserable shape, with no means of verifying any of the receipts nor their disbursements, with commingling of funds, with so many items of

personal expense charged off on the books and no way of ever accounting for the items of personal expense paid by the Corporation but not reflected in the books, with the alteration of records between the hearing in October, 1970, and January of 1971, the change in testimony, the transfer of corporate assets in the face of an injuctive order of the Court, and finally, the refusal by Mr. Krull to answer a legitimate question relating to his knowledge of the affairs of the Corporation, on the grounds that it might tend to incriminate him in a felony. is just no question that the assets of the Corporation were utterly idssipated and only the persons who received any benefits from the dissipation were the defendants Treadaway and Krull, and their legal advisers.

The difficult legal problem dealt with the rights of the respective plaintiffs in stock, and this question devolved entirely upon the legitimacy of the Second Issue. All plaintiffs have agreed that the Third Issue was invalid, but they do not all agree as to the Second Issue. Clearly, as the minutes of the Corporation reflect, the Second Issue was made, allegedly, to correct a disproportionate issue of stock in the First Issue, i.e., Carl and Mabel had put so much more in the way of assets into the Corporation in the beginning than had Gilbert and Irene. The reason that the word "allegedly" is used is that at the time of the Second Issue; the Keierleber Bankruptcy was eminent, and the bulk of the stock of Carl and Mabel had been pledged i.e., this would also be a means of issuing unencumbered stock. What

ever the motivation for the Second Issue. Carl and Mabel. with full knowledge, had given all of their assets to the Corporation at its inception, and no longer had any assets to give to the Corporation for a Second Issue. If the intent at the inception was for a proportionate issue, and it developed that the assets of Keierleber did not measure up to what they had been purported to be (and the testimony is that Carl furnished all of the estimates in value, not Gilbert) then a determination would have to be made as to whether or not Gilbert misrepresented that which he was using to pay for his stock, and the authorities hold that the recourse is for the Corporation to call in that portion of Gilbert's stock that was not paid for, i.e. that which he used to pay for his stock was misrepresented. There is

no authority for issuing more stock, as was done, to equate the interest, and particualrly in the face of an agreement, which is a part of the minute book, made at the outset of the Corporation, between the Keierlebers and the Iversons, to the effect that there would be no further issue of stock other than in proportion to the stock already issued. This becomes particularly relevant when the minutes reflect that the Keierlebers clearly did not consent to any Second Issue.

The conclusions of law submitted by the Farmers Bank indicate that they would prefer that the receiver first take stock of the whole situtation before the Court proceeds with an order for liquidation and dissolution, whereas the Untied Bank is asking for liquidation and

dissolution, but leaving the door open for the possibility of not liquidating or dissolving. The Court has chosen the latter course to that notice to creditors may be given, etc., so as to clearly define the assets and liabilities remaining. It is to be assumed that there will be additional contests over some of the claims, as well as some choices in action that the receiver will have to pursue. This should give all parties adequate time to arrive at agreement as to the question of ultimate liquidation and dissolution.

Defendants Krull and Treadaway called the attention of the Court to Section 5-518, RCM, 1947, relative to the disposition by a bank of acquired stock. It is their position that Farmers Bank should have sold their stock within six months, and in any event, within one year after acquisition. As such, they contend Farmers Bank cannot now

have any interest in these proceedings, i.e., that the action of Farmers Bank in even coninuing to hold the stock is ultra vires. The validity of the claim of Farmers Bank to ownership in stock in this Corporation has been contested throughout, to the extent that the Corporation has not issued stock to Farmers Bank, and has ignored all demand by Farmers Bank for recognition as a stockholder. As such, this Court take the position that Farmers Bank acquired no stock until the order of this Court, so determining, and even that date of acquisition would not be until this order is final, i.e., either affirmed on appeal, or no further right to appeal. The testimony clearly evidenced that the corporate stock is not listed on any exchange, nor on any market, and based upon United Bank's effort to sell

the stock, as well as the experience of Farmers Bank with the Corporation itself, there is no valid market, certainly not to the extent of the claim of Farmers Bank. Accordingly the, they would have one year form the date that this order is final to dispose of the stock. The question of whether or not the defendants Treadaway and Krull have standing to raise Section 5-518, RCM, 1947, is divided by the authority and the better-reasoned authorities, in the mind of this Court, treat the matter as being in a court of equity, where equity shall prevail. If the facts were to disclose that the acquisition of stock by pledge foreclosure was simply a means of investing in the capital stock of a corporation, it would be ultra vires, and could be raised by the debtor himself, much less other interested persons. In this particular case, there is no question in the Court's mind that the pledge was for

a security purpose, and that Farmers Bank has done all things possible to realize any value in the security, much less the amount of its claim.

The defendants Treadaway and Krull question the validity of the sheriff's sale involving the acquisition of stock by United Bank. Section 93-5810, RCM, 1947, provides that shares in any corporation, and all other property not capable of manual delivery, may be attached on execution, in like manner as upon writs of attachment. Section 93-4306, RCM, 1947, provides that the shares which the defendant may have in the stock of any corporation, together with the interest and profits thereon, and all debts due such defendant, may be attached, and it judgment be recovered, be sold to satisfy the judgment and execution. Section 93-4307, RCM, 1947, provides, in subdivision 4,

that investment securities as defined in the Uniform Commercial Code may be attached or levied upon only by seizure by the officer making the attachment or levy. It further provides that stocks or shares, or interest in stocks or shares, of any corporation, other than such investment securities, may be attached either by seizure or by leaving with the president, or to the head of the same, or the secretary, cashier, or other managing agent thereof, a copy of the writ, and a notice statingthat the stock or interest of the defendant is attached in pursuance of such writ. Section 93-4308, RCM, 1947, provides that in addition to the method prescribed in paragraph 4 of Section 93-4307 for attaching stocks or shares or interest therein of any corporation or company, if the president or other head of the same or the secretary; cashier, or other managing agent thereof does not live in Montana or

or cannot be found within the said state, the Clerk of the Court shall make an order directing the writ to be served upon the Secretary of State of the State of Montana, or in his absence from his office, upon the deputy Secretary of State of Montana. When such order has been made, the said writ of attachment shall be served upon the Secretary of State or in his absence upon the deputy Secretary of State by leaving with him a copy of said writ and a notice that the stock or interest therein of the defendant is attached in pursuance of such writ.

United Bank did all that it was required to do by the statutes, and the law presumes that public officials did that which they were required to do. There was no evidence given to the effect that official duty was not followed in some respect, nor any evidence given to show that the United Bank's manner of acquisition of stock was improper.

Mr. Krull was asked if he did not, in fact, have notice of the acquisition of stock, by the United Bank, prior to the meeting of January, 1967, in Dillon, Montana, and Mr. Krull refused to answer the question on the grounds that it might tend to incriminate him in a felony. The only way that United Bank could prove that the Secretary of State sent notice to the Corporation was by asking a manager of the Corporation if he received notice.

The Uniform Commerical Code makes it clear that the stock in this Corporation was not an investment security as to United Bank or Farmers Bank, and the Sections of the Revised Codes of Montana just cited dealing with attachments ends any legitimate inquiry.

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82-1625 NUMBER A863

SUPREME COURT OF THE

UNITED STATES OF AMERICA

Office-Supreme Court, U.S. FILED

1983

ALEXANDER L STEVAS. CLERK

RALPH BOUMA and MRS. RALPH BOUMA

Petitioners

VS

LARRY C. IVERSON, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF MONTANA

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME III

RALPH BOUMA Attorney Pro Se P.O. Box 220 Choteau, Mt. 59422 Tel: (406) 466-5374 JOHN ALBRECHT Attorney for Mrs. Ralph Bouma P.O. Box 193 Choteau, Mt. 59422 Tel: (406) 466-2621

NUMBER A863

SUPREME COURT OF THE

UNITED STATES OF

AMERICA

RALPH BOUMA and MRS. RALPH BOUMA

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME III

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TABLE OF CONTENTS VOLUME I

| ITEM | | PAGE |
|--|-----------|------|
| Appendix A - Summary Judgment for Plaintiff | | 1 |
| Appendix B - Iverson vs. Bouma (Mt., 1981) 639 P.2d 47 | | 28 |
| Appendix C - Order | | 95 |
| Appendix D - Opinion and Order Dismissing Appeal | | 102 |
| Appendix E - Order | | 107 |
| v | OLUME II | |
| Appendix F - Findings of Fact, Conclusion of Law and Order in consolidated cases Numbere | d | 109 |
| 8221/8073 V | OLUME III | |
| Appendix G - Memorandum in Lieu Transcript of Hearing Held September 25, 1979 | of | 201 |

TABLE OF CONTENTS VOLUME III

| ITEM | PAGE |
|---|------|
| Appendix H - Order | 234 |
| Appendix I - Motion for Disqualification for Cause | 238 |
| Appendix J - Affidavit for Disqualfication for Cause | 240 |
| Appendix K - Order | 248 |
| Appendix L - Petition for Rehearing Pursuant to Rule 34, Montana Rules of Appellate Civil Procedure | 250 |
| Appendix M - Receiver's Statement to the Court (In Part) | 257 |
| Appendix N - Excerpt from Deposition of Robert Keller | 268 |

APPENDIX G

| IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PONDERA | |
|---|-----------------------------|
| * | * |
| LARRY C. IVERSON, INC., |) |
| Plaintiff |) CAUSE NO. 8509 |
| v |) |
| RALPH BOUMA, MRS. RALPH BOUMA, his wife, CENTRAL BANK OF MONTANA, a Montana Corporation, GREAT FALLS IRON WORKS, a |) MEMORANDUM IN LIEU |
| |) OF TRANSCRIPT OF HEARING |
| Corporation, M. DEAN JELLISON, DOUGLAS L. PEACOCK, JACK M. PITZER, GREAT WESTERN |) HELD SEPTEMBER 25, 1979 |
| BANK AND TRUST COMPANY, and Arizona banking corporation and successor in interest to Pioneer Bank of Arizona, JOE |) |
| GLENN, LYNN BARTLETT, and TOM DOWLING |) |
| Defendants | * * * * * * * * * * * * * * |

The various motions pending in the above entitled matter came on for hearing before the Court at the courtroom of the Pondera County Courthouse at Conzad, Montana, commencing at 10:00 a.m. on the 25th day of September, 1979, The hearing was held pursuant to order of this Court dated July 19, 1970.

The persons present were as follows:

WARREN C. WENZ, attorney for the receiver

CRESAP McCRACKEN, attorney for the corporation and the receiver RAY F. KOBY, attorney for the corporation and the receiver RANDALL SWANBERG, attorney for the corporation and the receiver GALE GUSTAFSON, attorney for Mrs. Ralph Bouma

RALPH BOUMA, appearing as attorney pro se

DALE L. KEIL, attorney for Mrs. Ralph Bouma

JAMES JOHNSON, attorney for the receiver

There was no testimony presented and no evidence adduced at the hearing. The hearing consisted of oral argument presented by counsel for the parties including RALPH BOUMA, attorney pro se, and dialogue between the Court and counsel and RALPH BOUMA, attorney pro se with respect to the legal and factual issues discussed during argument.

The argument was followed by various oral orders issued by the Court from the bench.

This Court cannot reproduce the oral arguments advanced by counsel or the dialogue between the Court and counsel. However the Court has

detailed notes relating to the oral orders issued from the bench and these are being set forth herein verbatim. The verbatim orders are set forth within quotation marks in subparagraph form.

All of the parties have previously been advised by copy of a letter dated October 9, 1979, addressed to MR.S SARAH M. ROWE, Clerk of the District Court, Pondera County, Conrad, Montana, that the stenographic notes taken by the Court Reporter, CERESE PARKER, at the September 25, 1979, hearing were stolen from her automobile. By reference, this letter together with the attachments thereto, is made a part of this Memorandum.

For the benefit of the defendants, RALPH BOUMA and MRS. RALPH BOUMA, the Court will now restate the last paragraph contained in the said letter dated October 9, 1979, which is as follows, to-wit:

"MR. GUSTAFSON is concerned about protecting his clients right to appeal. I'm certain the MR. BOUMA has the same concern. It is my contention that under these circumstance to oral orders made from the bench will not be considered dated September 24, 1979, but will bear the date that they are in fact filed with the Clerk of Court in written form" Shortly, after the hearing commenced, the Court announced that it would hear oral argument with reference to the following issues:

"(1) The application of the plaintiff, GEORGE CAMPANELLA, as
Receiver for use and benefit of LARRY C. IVERSON, INC., to
withdraw as party plaintiff and to substitute LARRY C. IVERSON,
INC. as the party plaintiff and application to substitute
counsel representing the plaintiff.

- "(2) Motion of the plaintiff for summary judgment.
- "(3) The motion of the defendant, RALPH BOUMA, for summary judgment on BOUMA"S counterclaims against the plaintiff, (filed as Item 398)
- "(4) The contention of BOUMA that his most recent request for admissions stand admitted.
- "(5) Defendant BOUMA"S motion for summary judgment dated September 10, 1979."

First the Court heard oral argument with respect to the application of the plaintiff-receiver to withdraw as party plaintiff and to substitute as party plaintiff LARRY C. IVERSON, INC., and application to substitute attorneys to represent LARRY C. IVERSON, INC.

RALPH BOUMA, attorney pro se and attorneys for MRS. RALPH BOUMA,

argued that the application should be denied.

During the argument the Court asked BOUMA and counsel for MRS.

RALPH BOUMA if they contended that they would be prejudiced if the application were granted or did they contend that the granting of the motion would change the nature of the cause of action against them.

Nothing in the responses to these questions indicated to the Court that said parties would be prejudiced or that the granting of the application would change the nature of the cause of action against them.

After listening to oral argument and being fully advised the Court then orally ruled from the bench as follows:

"This application has been made pursuant to Order dated February 8, 1978, in combined Civil No. 8221 and 8073 pending in the above entitled Court. The Court in this cause takes judicial notice

of the said Order dated February 8, 1978. The application to substitute LARRY. C. IVERSON, INC., as the sole party plaintiff is granted and IT IS ORDERED that the name GEORGE CAMPANELLA, as receiver for the use and benefit of LARRY C. IVERSLN, INC. be removed as party plaintiff to the above entitled cause and that henceforth the party plaintiff shall appear as 'LARRY C. IVERSON, INC., Plaintiff."

"For authority the Court relies on Rule 25(c) M.R.Civ.Proc., 59 AM Jur 2d 685 (Sec. 224-Parties and the annotation 135 ALR 325."

"IT IS FURTHER ORDERED that plaintiff's motion for substitution of counsel to represent the plaintiff, LARRY C. IVERSON, INC., be

and same is hereby granted."

Following the Order respecting Issue (1), the Court heard argument on Issue (2). Then the Court ruled from the bench as follows: "Plaintiff in the above entitled action has moved the Court to enter summary judgment in favor of the plaintiff and against the defendants. RALPH BOUMA and MRS. RALPH BOUMA, declaring the contract described in plaintiff's complaint herein dated July 17, 1978, wherein LARRY C. IVERSON, INC. is the seller and RALPH BOUMA is the buyer, to be null, void and of no force of effect. The motion has come regularly to be heard by this Court on the 25th day of September, 1979. The Court has read the briefs of the parties in favor of the motion and opposing the motion

and has heard the oral argument of counsel. The Court, being fully advised, has determined that the motion should be granted.

"THEREFORE IT IS ORDERED, ADJUDGED AND DECREED:

(1) That the plaintiff's motion for summary judgment be, and it is hereby granted.

"The Court now states its reasons for the granting of the motion."
The material facts upon which the Court relied and as to which there was no material issue, are contained in the affidavits filed herein by the respective parties, in the depositions, in all pleadings and documents filed in these proceedings and in court decrees and orders and findings of fact and conclusions of law supporting same entered in Pondera County consolidated

causes 8221, 8073 of which this Court may take judicial notice. "The contract which by this judgment is declared null and void consists of a contract for deed and agreement, both dated July 17, 1968, and an agreement dated July 16, 1968, copies of which are annexed to the answer of MRS. RALPH BOUMA filed herein, as Exhibits A, B and C thereof.

"The corporate records reflect only two purported stockholders meetings prior to the execution of the BOUMA contract. One meeting was the organizational meeting of the corporation held at Dillon, Montana at the Andrus Hotel January 30, 1967. At neither meeting was there any consideration of a sale of the land covered by the BOUMA contract, to BOUMA. However the bylaws

indicating adoption and approval on July 13, 1964, contained the following provision:

"The Board of directors shall have the power and general authority to sell, lease, morgage, exchange, or otherwise dispose of the whole or any part of the property and assets of every kind and description of the corporation, for property, or for the whole or part of the capital stock of any other corporation...'

"Chapter 9, Title 15, 1947, R.C.M., as amended comprised part of the former Montana Corporation Code, relating to the procedure of the sale of corporate property and was in effect with respect to LARRY C.IVERSON, INC., at the time of it's incorporation in 1964 through the time of the BOUMA contract dated July 1968.

"The Court finds that the rights of the stockholders of the corporation at the time of the BOUMA contract were violated in the context of a completely ultra vires transaction between BOUMA and usurpers of de facto control of LARRY C. IVERSON, INC. "LARRY C. IVERSON, INC. was incorporated in 1964 by CARL O. IVERSON and with members of his family, to own a 4,520 acre wheat farm near Ledger, Montana, east of Conrad, Montana, which is the IVERSON farm which ultimately became the subject of the BOUMA contract here in dispute.

"GIL & IRENE KEIERLEBER also became shareholders conveying certain of their farm property to the company. Shares in the company were initially issued to the IVERSON family members and to the KEIERLEBERS. Both families became involved in financial

ventures in Arizona and Colorado, and their financial circumstances deteriorated following incorporation. Some of the Iverson and KEIERLEBER shares were pledged to Farmers State Bank to secure loans. Eventually the Bank acquired the pledged IVERSON shares and some and some of the KEIERLEBER shares by foreclosure. The remainder of the KEIERLEBER shares were acquired by the KEIERLEBER trustee in bankruptcy (STANLEY W. SWAINE) by virtue of the bankruptcy. United Bank of Pueblo became owner of certain of the IVERSON shares through Sheriff's sale on execution for satisfaction of judgment on debts arising in Colorado.

"In 1968, Farmers State Bank and STANLEY W. SWAINE commenced a stockholders derivative action against LARRY C. IVERSON, INC.

and persons controlling it (Cause No. 8073). In 1969, United Bank of Pueblo (the Arkenasa Valley Bank) commenced an action for similar relief and for corporate dissolution. Both actions were consolidated during the trial of Cause No. 8221, and concluded in 1971, with the exception of continuing jurisdiction to govern the receivership of the corporation. GEORGE CAMPANELLA originally appointed receiver pendente lite, was affirmed as receiver in the final judgment.

"The present action arose out of the court ordered efforts of receiver CAMPANELLA to recover the 4, 520 acre wheat farm at Ledger, Montana which is and was the principle asset of the corporation. Farmers State Bank, United Bank of Pueblo and

STANLEY W. SWAINE, as bankruptcy trustee for the KEIERLEBERS, have supported this endeavor as a means of restoring to their share ownership in the corporation, some actaul cash value. "Findings No. 7,8 & 9 of the Decree in combined Cause No. 8221-8073 finds that Farmers State Bank of Conrad, United Bank of Pueblo, and STANLEY W. SWAINE, Trustee in bankruptcy of IRENE A. KEIER-LEBER and GILBERT F. KEIERLEBER became shareholders of LARRY C. IVERSON, INC. in 1966 and 1967 which was prior to the execution of the BOUMA contract in July 1968. These three shareholders acquired 717, 118 and 600 shares respectively of 1,875 outstanding shares. owning percentages of 38%, 6% and 32% for a total percentage ownership of 76% of the company at the time of the BOUMA contract.

"Under the provision of Chapter 9, Title 15, 1947 R.C.M. consent of 2/3rd's of the outstanding shares was necessary to effect a valid sale of the IVERSON land which was the only remaining significant corporate asset of appreciable value.

"In the absence of affirmative vote of Farmers State Bank of Conrad, or absence of affirmative vote of United Bank of Pueblo in combination with the vote of the trustee in bankruptcy would have prevented obtaining the necessary affirmative 2/3rd's vote to authorize the sale. In fact, none of the shareholders voted in favor of the sale, and, in fact, there was never a stockholders meeting to authorize the sale in the first place, and there was never opportunity to vote for or against the sale.

"The purported sale of the IVERSON farm was accomplished during a so-called directors' meeting at Phoenix, Arizona July 19, 1968. The participants in the directors' meeting were JOHN C. TREASWAY and J. MILTON KRULL who were held to be corporate usurpers who were ousted by the decree in combined Cuases No. 8221-8073. CARL IVERSON was also indicated as having participated in the board meeting, and MABEL IVERSON was indicated by the minutes as having been the secretary at the time. The decree in combined Cause 8221-8073 reveals that both the IVERSONS had long since ceased to be shareholders in the company. Under the comporate law in force at that time, its was necessary that a member of the board of directors be a stockholder.

"The purported directors' meeting held July 19, 1969, did not observe any of the statutory requirements set forth in Chapter 9 Title 15 of the Montana Corporation Code which was then in effect. No notice of stockholders was held; no provision was made for protection of the rights of dissenting stockholders, as the statutes require. No publication of notice or filing of the resolution authorizing sale was published in the only newspaper printed in Pondera County (The Independent-Observer). and there was no filing of the certificate of proceedings and resolution authorizing sale with the Pondera County clerk and Recorder.

"There was no Montana attorney used in connection with the trans-

action although an Arizona attorney was empoyed for the purpose of drafting papers. Thre was no title investigation which would have been normal in such a large transaction. The contract by its very terms, authorizes payment of 44% of the unpaid installment balance of the contract directly to the corporate usurpers, KRULL and TREADAWAY, instead of to the corporation as would be the normal transaction.

"The transaction on its face was suspect and bore the hallmarks of fraud.

"I previously mentioned th by-law provision authorizing the directors to sell the whole or any part of the assets of the coporation. "The corporation record book is dated July 11, 1964, and the original organizational meeting was held August 19, 1964. "Sections 15-908 and 15-909, 1947 R.C.M. which were then in effect require that such a by-law, in order to be effective, must be noticed and published in a newspaper printed in the county, and recorded in the office of the county clerk and recorder in the same fashion as specific authorization meetings for sale of substantially all of the corporation assets. The affidavits of publisher JACK LEE and Clerk and Recorder GLADYS MORENSON, both establish that no such notice was published, and no such filings were made in the Clerk and Recorder's Office.

"Thus the Court finds that the by-law provision authorizing the sale of corporate assets was invalid for failure to follow the statutory procedure.

"This was the holding in Hanrahan v, Anderson, 108 Mont. 218,

90 P. 2d 494 (1939), where the Montana Court said: '* * * It is equally well settled in the absence of expressed statute, that in the case of a solvent corporation which has accumulated property for use in this business, neither the directors, nor even the stockholders except by unanimous vote, have the authority to dispose of such property except in the futherance and in the ordinary course of the business; for otherwise the authority is being used to defeat, to that extent, the very purpose for which the authority was given.'

"* * * The reason for the rule is that the purpose of a solvent corporation and its stockholders is not to be defeated in whole or in part by the directors, not even by the stockholders without unanimous consent, unless expressly provided

by law. * * * It was to relax the rule in the latter respect so as to prevent a small minority from thwarting the will of the overwhelming majority that the statute now appearing as Sec. 6004, supra (6004 later became Sec. 15-901 R.C.M. 1947) was enacted; and to make the relaxation of the law effective, its requirements must be essentially complied with. * * * The conveyance to Consolidated was a nullity, for the stockholders meetings purporting to authorize it were held on insufficient notice.'

"It would appear that there is another ground for finding that the BOUMA contract is void. I refer to the statement of the author appearing 19 AM Jur 2d 441 (Sec. 963, which is the article on Ultra Vires Transactions). The author says:

"It is also to be observed, by way of limitation of the

doctrine of ultra vires, that an attempted conveyance by the officers of a corporation of its property without authority does not involve the doctrine of ultra vires, but of agents to act on behalf of their principle without authority.'

"The author gives as authority for this statement <u>Hotaling v.</u>

<u>Hotaling</u>, 193 Cal. 368, 224 P. 455, 56 ALR 734.

"In <u>Hotaling</u>, the president's secretary assigned a deed of corporate property to a grantee. At that time the board of directors conissted of five members and under the by-laws and under state law a majority of the board of directors was necessary to conform a valid cop-orate act. At the meeting which the resolution for the sale of this property was adopted, there were only three directors

present and since one of the directors was the grantee named in the deed, he was disqualified from voting and this left only two directors and this did not constitute a majority of the board.

"The California Court held the deed to be void and said:

"'It is suggested that the doctrine of ultra vires, as applied to the private corporation, and particularly as applied to a close corporation, as in the present case, should be confined without narrow bounds, this is not a question of ultra vires, but of agents assuming to act in behalf of the corporate principle in a matter in which they lack authority to bind the principle.'

"In this regard, the Court finds that defendant, RALPH BOUMA, knew or should have known that the purported officers who authorized the

the BOUMA contract in July 1968, did not have authority to authorize the sale. See the Answer and Counterclaim of defendant, RALPH BOUMA filed September 22, 1972 (Item 96). In his Seventh Defense Bouma says:

"'This defendant admits that he knew there was litigation between LARRY C. IVERSON, INC. and Farmers State Bank of Conrad at the time he entered into the contract for deed ated July 17, 1968, with LARRY C. IVERSON, INC., such knowledge being the basis for the provision on said contract for deed, referred to in paragraph 2, Second Defense, with particular reference to the agreement therein, * * *.

"'This defendant futher admits that it was futher made known to him that in Cause No. 8073, Farmers State Bank of Conrad

was challenging the authority of the officers of LARRY C.

IVERSON, INC., to act as such. Therefore, this defendant
hesitated to consumate the transaction with LARRY C. IVERSON,
INC., until EARL M. BERTHELSON, president of the very Bank
challenging the authority of the aforementioned officers * *.'

Following the foregoing Order and Opinion, the Court then announced from the bench:

"It appears that there's one other thing which must be handled before this case can be concluded and this is the adjusting of accounts between RALPH BOUMA and the plaintiff corporation.

"My first impression is that the ocrporation must restore to RALPH BOUMA everything of value which it received under the contract which ahs now been declared void and rescinded and that

RALPH BOUMA must do likewise. It would appear that this will involve an accounting which will have to be submitted and settled.

"The Court intends to recess for 10 minutes so that counsel for the plaintiff and MR. RALPH BOUMA can reflect on this problem. At the end of the 10 minute recess, we will return to court and counsel for the plaintiff and MR. BOUMA can each give me his view on how this should be handled.

"It might be that you would like to each research this issue and each of you submit his contentions on this issue together with citation of authority.

"It might be that this issue of settling accounts should be handled in the receivership action.

"At any rate the Court will be in recess of 10 minutes and at the end of that time each of you will present your suggestions concerning this matter."

Upon return from recess, the Court heard statements from respective counsel and then the Court made an oral ruling from the bench, which the Court cannot reproduce werbatim at this time. Therefore the Court now, at this later date, makes the following order:

IT IS ORDERED that on or before the 9th day of November, 1979, te plaintiff shall file with the Clerk of this Court and serve upon counsel for MRS. RALPH BOUMA and upon RLAPH BOUMA, counsel pro se, a proposed summary judgment to be entered by the Court in conformity with the orders and opinions set forth in this memorandum. Attorneys

for MRS. RALPH BOUMA and RLAPH BOUMA, attorney pro se, shall have five (5) days thereafter to file and serve their written objections to same. A copy of the proposed judgment and a copy of the objections shall be forwarded to the Judge by mail addressed as follows:

LEONARD H. LANGEN Judge of the District Court P.O. Box 1110 Glasgow, Mt. 59230

IT IS FURTHER ORDERED that counsel for the plaintiff shall also file and serve recommendations for method of adjusting accounts between plaintiff and defendants or plaintiff may, at its option, make provision for same in the proposed judgment. Counsel for plaintiff should also make recommendations for bringing this case to a final conclusion. All of the documents relating to the foregoing shall be filed with the Clerk of this Court on or before November 9, 1979,

and copies of all such documents shall be served upon defendants and copies mailed to the undersigned Judge at the addres in Glasow, Montana. Defendants shall have five (5) days thereafter within which to add their recommendations or within which to make their objections to plaintiff's proposals. Unless oral argument is specifically requested, all of these matters will be deemed submitted to the Court as of November 19, 1979, on the basis of written memorandum.

The Court then took up Issue (3), to-wit: BOUMA'S motion for summary judgment on his counterclaim against the plaintiff (Item 198)

The Court announced that it appeared that the issues presented by BOUMA;s counterclaims against the plaintiff should be resolved in the accounting between plaintiff and BOUMA. At this time the Court cannot recall exactly how it ruled on Issues (4) and (5) and therefore at this time rules as follows:

Issue No. (4) and (5) became moot with the Court's ruling in favor of plaintiff and against the defendants, RALPH BOUMA and MRS.

RALPH BOUMA with reference to plaintiff's motion for summary judgment.

However, so far as Issue (4) is concerned, it is noted that JUDGE THOMAS Made his order in the above entitled cause dated December 2, 1977, suspending further discovery.

So far as Issue (5) is concerned, it is noted that defendants motion for summary judgment dated September 10, 1979, is a repetition of BOUMA'S motion was legally insufficient and redundant and briefs in support thereof contained matter which is redundant and scandalous in nature and introduces extraneous material.

Even though Issue (5) is moot, I adopt by reference the reasons given by JUDGE THOMAS in his order dated December 2, 1976, and ORDER that defendants' motion for summary judgment be and same is hereby denied.

During the hearing plaintiff filed its written motion pursuant to Rule 41 M.R.Civ.Proc. for the dismissal of the defendant, MRS.

RALPH BOUMA for the reason that with the repeal of the Dower Statutes formerly applicable in the State of Montana that she no longer a real party in interest.

Oral argument was presented with respect to this motion and GALE R. GUSTAFSON and DALE L. KEIL, attorneys for MRS. RALPH BOUMA, each presented oral arguemnt in opposition to the motion.

RALPH BOUMA also made oral argument in opposition to the motion. Subsequently by document entitled "Withdrawal of Motion" dated

October 19, 1979, the plaintiff withdrew its previously filed Rule 41 motion directed toward the dismissal from the suit of the defendand, MRS. RALPH BOUMA and by Order dated October 23, 1979, the Court made its written Order that the motions to dismiss MRS. RALPH BOUMA will be disregarded.

DATED this 26th day of October, 1979.

Leonard H. Langen Presiding Judge

APPENDIX H

| IN THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA, IN AND FOR THE COUNTY OF PONDERA * * * * * * * * * * * * * * * * * * | * |
|--|---|
| LARRY C. IVERSON, CIN., |) |
| Plaintiff | CAUSE NO. 8509 |
| vs |) |
| RALPH BOUMA, MRS. RALPH BOUMA et al., | ORDER) |
| Defendants * * * * * * * * * * * * * * * * * * * |) * * * * * * * * * * * * * * * * * * * |

An Affidavit for Disqualification for Cause having been filed by Defendant Ralph Bouma for the purpose of removing the Honorable Leonard Langen from presiding further in the above-captioned matter on January 25, 1982.

Thereafter, on February 4, 1982, the Chief Justice of the Montana Supreme Court appointed the undersigned District Judge to preside over and conduct the disqalification proceedings in Pondera County Cause No. 8509.

On February 9, 1982 a hearing was set to be conducted on Tuesday, February 23, 1982 for the purpose of determining the issue of disqualification of Honorable Leonard Langen, and attorneys of record were thereupon notified, as well as Judge Langen.

That on February 9, 1982, plaintiff filed its motion to strike the Bouma affidavit of January 25, 1982, with a Memorandum in Support.

That on February 22, 1982, Ralph Bouma filed a Memorandum in Support of his Affidavit of Disqualification.

That on said February 23, 1982, Ralph Bouma appeared personally

and as pro se counsel; that attorneys McCracken and Koby appeared on behalf of Plaintiff Iverson Inc.; that attorney Gustafson appeared on behalf of Mrs. Bouma; that Honorable Leonard Langen did not appear after notice; that Ralph Bouma presented evidence by way of witnesses and exhibits; and that arguments were presented by Ralph Bouma, and attorneys Gustafson and McCracken, and good cause showing; now, therefore;

IT IS HEREBY ORDERED:

1. Removal of Hon. Leonard Langen as presiding judge herein is denied, there being no sufficient showing of any personal bias or prejudice on the part of said judge against Defendant Ralph Bouma, as rulings by Judge Langen against the interests of the defendants were upheld by the Supreme Court of the State of Montana.

- Plaintiff's motion to strike the Bouma affidavit of disqualification is granted.
 - 3. No penalties shall be assessed against Ralph Bouma.
- 4. Honorable Leonard Langen is invited to proceed in this matter as required by law.
- 5. The Clerk shall transmit copies hereof to the Chief Justice of the Nontana Supreme Court, to Mr. Bouma, and to all counsel of record, and to the Honorable Leonard Langen.

DATED THIS 25th DAY OF FEBRUARY, 1982.

Mark R. Sullivan

District Judge Presiding By order of the Chief Justice of the Montana Surpeme Court

APPENDIX I

| IN THE SUPREME COURT OF THE STATE OF MONTANA | | |
|---|------------|-----------------------------|
| * * * * * * * * * * * * * * * * * | sk | |
| RALPH BOUMA and MRS. RALPH BOUMA |) | |
| Appellants |) | No. 82-81 |
| vs |) | MOTION FOR DISQUALIFICATION |
| LARRY C. IVERSON |) | FOR CAUSE |
| | | * * * * * * * * * * * * * |
| Ralph Bouma moves the justice | es of the | Montana Supreme Court to |
| disqualify themselves from hearing | g this app | eal. The facts supporting |

the disqualfication are outlined in the affidavit.

The reason for disqualification besides those stated in the affidavit is that no justice should sit on a case when he rendered the judgment, Section 3-1-802 (3) M.C.A. The Affidavit states facts which show that the Montana Supreme Court was biased in rendering the Judgment in Iverson, Inc., vs. Bouma (Mt., 1981) 639 P.2d 47.

Ralph Bouma asks that the seven substitute justices be named by the Judicial Nominating Commission, Section 3-1-1001 et.seq. M.C.A. The purpose of this procedure is to avoid any appearance of impropriety.

Dated this 30th day of August, 1982.

/s/ Ralph Bouma

Ralph Bouma Appellant and Attorney Pro Se P.O. Box 220, Choteau, Mt.

APPENDIX J

| IN THE SUPREME COURT OF THE STATE OF MONTANA * * * * * * * * * * * * * * * * * * * | |
|--|---|
| RALPH BOUMA and MRS. RALPH BOUMA) | |
| Appellants) | NO. 82-81 |
| vs) | |
| LARRY C. IVERSON, INC. | AFFIDAVIT FOR DISQUALIFICATION |
| Respondent) | FOR CAUGE |
| * * * * * * * * * * * * * * * * * * | FOR CAUSE * * * * * * * * * * * * * * * * * * * |
| State of Montana) | |
| County of Teton) | |

- I, Ralph Bouma, after being first duly sworn, depose and say:
- 1. This affidavit is made for the purpose of disqualification for cause of the seven justices of the Montana Supreme Court who enterred the order in Iverson vs. Bouma, Supreme Court Number 80-83 which

was heard on oral argument on September 15, 1981, for the reason that Affiant believes the he cannot have a fair and impartial hearing due to their bias and prejudice against him in this case and because those justices would be sitting as judge of their own prejudice in their order, Iverson vs. Bouma (Mt. 1981) 639 P.2d 47.

2. On September 25, 1979, Judge Leonard Langen filed on public record an affidavit filed in camera (Docket Number 474) together with an application to impanel a grand jury (Docket Number 471-472) over the sremous objection of affiant and counsel for Mrs. Ralph Bouma on the basis that five of the justices of the Montana Supreme Court were named therein and that counsel for Larry C. Iverson, Inc., would use the same to emotionalize and prejudice the Montana Supreme Court making it impossible for affiant and his wife to have a fair appeal (Memorandum

in Lieu of Transcript, Docket Number 485, at 5, Transcript of February 23, 1982, Hearing at 171).

- 3. A few days prior to the September 15, 1981, oral argument in Iverson vs. Bouma, Supreme Court Number 80-83, Attorney Gale Gustafson (Counsel for Mrs. Ralph Bouma) received notice from the Commission on Practice of the State Bar of Montana that in the Fall of 1979 Chief Justice Frank Haswell had received a copy of the Bouma Afficait (Docket Number 474). He directed the Commission to make an investigation. This highly intimidated Gustafson at the September 15, 1981, oral argument before the Montana Supreme Court.
- 4. Two minutes prior to the oral arguemnt before the Montana
 Supreme Court Affiant and Gustafson were summoned into Chambers. They
 were notified that Affiant would not be allowed to address the Court

as Attorney Pro Se. They were told that Gustafson would be required to present argument for Affiant and Mrs. Ralph Bouma.

- 5. Affiant objected to this on the basis that Gustafson could not be effective counsel for Affiant. In addition, Affiant's constitutional and statutory right to represent himself was being violated.
- 6. At the conclusion of Gustafson's argument Justice Morrison asked, "Now, Mr. Gustafson, what has all this got to do with the issues before the Court?" This demonstrates that Gustafson did not effectively argue the legal issues of Affiant.
- 7. At the beginning of oral argument the counsel for Iverson, Inc., Ray Koby said, "One of them that was filed was an affidavit which was submitted to Judge Langen in order to encourage the Judge to impanel the grand jury to consider criminal proceedings against

various parties involved in the litigation... This affidavit is document 474 filed September 25, 1979. In this affidavit which is, I don't know, 30 pages long and its sworn to by Ralph Bouma under oath, there in paragraph 44, that I believe the Court ought to know about. ... In paragraph 44 starts out, and in furtherance of the conspiracy referred to above in Paragraph 9, herein, Wesley Castle, James C. Harrison, Frank I. Haswell, Gene E. Daley, and John Connley Harrison individually and as justices of the Montana Supreme Court under color of state law and or authority in concert with the parties referred to above in Paragraph 30 herein, and in strategy, publicly proclaimed by Cresap F. McCraken, willfully purposely and in bad faith reinterated in their April 5, 1974, Opinion of Montana Supreme Court Cause

- 12514, the comment Frank I. Haswell made at the March, 1974, hearing which reads as follows..."
- 8. Gustafson, on behalf of Ralph Bouma and Mrs. Ralph Bouma, objected to his argument saying that Koby was trying "to emotionalize the court and steer it from the issues at hand:
- 9. Koby concluded his argument by saying, "I have been advised by my co-counsel that I have extremely over-killed".
- 10. Cresap McCraken opened his arguemnt for Iverson, Inc., by saying, "Its very easy to get emotional and get carried away under the circumstances of this litigation." This shows that Counsel for Iverson, Inc., were working on emotions and not the facts or the law.
- 11. The attorneys for Iverson, Inc., were given a full hour to incense and emotionalize the Court on issues totally irrelevant to the

validity of the land contract. Affiant was without effective counsel because of the last minute substitution of counsel by the Supreme Court and was forbidden to address the Court at all.

- 12. Affiant filed a civil rights action alleging that the justices of the Supreme Court violated his civil rights. This was referred to in the Court's opinion in <u>Iverson</u>, <u>Inc.</u>, <u>vs. Bouma</u> (Mt. 1981) 639 P.2d 47, 53. The justices so named should not preside in this case, <u>Johnson vs. Mississippi</u> (1971) 403 U.S. 212, 29 .Ed. 2d 423, 91 S. Ct. 1778.
 - 13. This affidavit has been made in good faith.

Dated this 30th day of August, 1982.

/s/ Ralph Bouma

Ralph Bouma Appellant and Attorney Pro Se Box 220, Choteau, Mt. Subscribed and sworn to before me this 30th day of August, 1982.

/s/ Jonnie Ruth Conatser

Notary Public for the State of Montana Residing at: Choteau, Mt. My Commission: 5.21.85

APPENDIX K

| IN THE SUPREME COURT OF THE STATE OF MONTANA * * * * * * * * * * * * * * * * * * * | * * |
|--|------------------|
| RALPH BOUMA and MRS. RALPH BOUMA, |) |
| Appellants, | NO. 82-81 |
| vs |) |
| LARRY C. IVERSON, | ORDER |
| Respondent * * * * * * * * * * * * * * * * * * * |) *********** |

PER CURIAM:

Ralph Bouma has filed herein a motion to disqualify the Justices of this Court, with the exception of Justice Shea, from further participation in this cause for the reasons set forth in his motion. The Court has examined, discussed and considered said motion.

IT IS ORDERED:

- The motion of Ralph Bouma for disqualification for cause is denied for the reasons set forth in respondent's memorandum filed herein.
- The Clerk is directed to mail a true copy hereof to Ralph Bouma personally, and to counsel for Mrs. Ralph Bouma and respondent Larry Iverson, Inc.

DATED this 9th day of September, 1982.

For the Court,

By. Frank Haswell
Chief Justice

APPENDIX L

| STATE OF MONTANA | | |
|--|-------|--|
| * * * * * * * * * * * * * * * | * * | |
| RALPH BOUMA and MRS. RALPH BOUMA |) | No. 82-81 |
| Appellants |) | DESTATON FOR DEURARANG BURGUAN |
| vs |) | PETITION FOR REHEARING PURSUAN TO RULE 34, MONTANA RULES OF |
| LARRY C. IVERSON, INC. |) | APPELLATE CIVIL PROCEDURE |
| Respondent * * * * * * * * * * * * * * * * * * * | * * * | * * * * * * * * * * * * * * * * * * |

Ralph Bouma, Pro Se, and Mrs. Ralph Bouma by her attorney, John Albrecht, petitions the Supreme Court of the State of Montana for a rehearing of the Opinion and Order Dismissing Appeal filed On December 2, 1982. The reasons for the Re-hearing are:

- 1. Damages in the amount of \$500.00 were awarded to Respondent Larry C. Iverson, Inc., pursuant to Rule 32. Larry C. Iverson, Inc., did not request such relief for this reason, Iverson waived any right to such relief.
- 2. Since Iverson did not request such relief, Boumas made no argument on the issue. They were effectively denied due process which includes notice and opportunity to be heard, Memphis Light, Gas and Water Division vs. Croft (1978) 436 U.S. 1, 16, 19.
- 3. Rule 32, M.R. App. C.P., allows damages on appeal to be awarded only if the appeal was taken for purposes of delay. No delay was caused by the Boumas taking this appeal.
- 4. Rule 32, M.R. App. C.P., allows damages on appeal only if the appeal is without substantial or reasonable grounds. One of the

grounds for appeal was the bias and prejudice of the trial court judge. Iverson filed a writ of supervisory control saying that issue could not be raised. The Supreme Court denied that writ. In doing so, the Supreme Court implicitly held that the bias and prejudice of the trial court judge could be raised.

- 5. The Montana Supreme Court held the Boumas' appeal to be "frivolous". Black's Law Dictionary, Revised 4th Edition (1968) defines a frivolous appeal as "one presenting no justiciable question and so readily recognizable as devoid of merit on face of record that there is little prospect that it can ever succeed." If this appeal was frivolous, then the Supreme Court should have granted Iverson's application for a writ of supervisory control.
 - 6. Judge Leonard Langen's bias and prejudice was shown by the

following facts:

- A. He was appointed by Judge R.D. McPhillips. The uncontroverted evidence showed that Judge McPhillips intended to appoint a judge unsympathetic to the Boumas (Transcript of the February 23, 1982, Hearing at 37-39).
- B. Judge Langen summarily disposed of a number of the Bouma's defenses. (Transcript of February 23, 1982, Hearing at 64-65).
- C. Judge Langen appeared prejudiced against the Boumas (Transcript of February 23, 1982 Hearing at 101, 105). The Supreme Court ignored unrefuted testimony by Mr. Murray (expert land appraiser for Iverson, Inc.) that he had never been in a court in 35 years where there was more bias on the part of the court that

there was toward the Boumas at the hearing held by Judge Langen on September 25, 1979 (Transcript of February 23, 1982 hearing at 105).

- D. Judge Langen ordered an affidavit of Ralph Bouma filed. The affidavit accused five justices of the Supreme Court of crimes. Bouma asked that the affidavit not be filed to prevent the creation of bias and prejudice on the part of the Supreme Court. Judge Langen ruled he had no authority to impanel the grand jury yet ordered the affidavit filed (Memorandum in Lieu of Transcript of Hearing Relating to Application for Order Summoning a Grand Jury held in September 25, 1979, at 5, Transcript of February 23, 1982, Hearing at 170, 171).
- E. Judge Langen summarily substituted a partially reconstituted

corporation for the Receiver.

- F. Judge Langen acted as if he were counsel for one party (Transcript of February 23, 1982, Hearing at 85, 89 and Transcript of December 20, 1979 Hearing).
- G. Judge Langen was the Defendant in a civil rights action brought by the Boumas.
- 7. The Montana Supreme Court's bias and prejudice was shown by the following facts:
 - A. The Montana Supreme Court refused to allow Ralph Bouma to argue his case yet allowed Iverson's attorneys the right to oral argument.
 - B. Five of the seven justices were named in a civil rights action

brought by the Boumas.

- C. Five of the seven justices were named as possible defendants in an affidavit requesting the impaneling of a grand jury. This affidavit was used at oral argument by Iverson's attorney to induce and prejudice the Supreme Court's failure to consider numberous issues.
- 8. The Montana Supreme Court's order of December 2, 1982, is in direct conflict with <u>Johnson vs. Mississippi</u> (1971) 403, U.S. 212, 29 L. Ed. 2d 423, 91 S. Ct. 1778. In <u>Johnson</u> the United States Surpeme Court held that a State Court Judge may not hear the case of a party if the judge is a Defendant in a civil rights action brought by that party. In this case, both the Cupreme Court Justices were named and the Trial Court Judge was a Defendant in an action by the

Boumas.

CONCLUSION

For the above stated feasons, the Montana Supreme Court should:

- 1. Vacate the order awarding \$500.00 damages on appeal.
- 2. Hear the appeal on its merits.
- Reverse the summary judgment of the Trial Court and order a jury trial.

Dated this 10th day of December, 1982.

Ralph Bouma
Attorney Pro Se
P.O. Box 220
Choteau, Mt.

John Albrecht

Attorney for Mrs. Ralph Bouma

APPENDIX M

UNITED BANK OF PUEBLO (formerly Arkansas Valley Bank), a Colorado banking corporation,

Plaintiff

VS

LARRY C. IVERSON, INC., a Montana corporation, CARL O. IVERSON, MABEL IVERSON, LARRY C. IVERSON, M. DEAN JELLISON, and FARMERS STATE BANK, a Montana Banking Corporation,

Defendants

FARMERS STATE BANK OF CONRAD, a Montana banking corporation, and STANLEY M. SWAINE, Trustee of the estates of Gilbert F. Keierleber and Irene A. Keierleber, Bankrupts,

Plaintiffs

VS

LARRY C. IVERSON INC., a Montana corporation, et al,

Defendants

Nos. 8221 and 8073

RECEIVER'S STATEMENT TO THE COURT (IN PART)

COMES NOW, George L. Campanella, Receiver in the above-entitled causes, and respectfully submits the following statement to the Court

pursuant to its Order dated December 2, 1977, and in support of his Administrative Petition herein dated December 1, 1977. He has petitioned for a court ordered abandonment of Civil Cause No. 8509 as an asset of Larry C. Iverson, Inc., for the following reasons:

1. IN THE OPINION OFTHE RECEIVER AND HIS COUNSEL THE PRIMARY EQUITABLE BASIS SUPPORTING THE SUIT IS PROBABLY NOT PROVABLE.

Apart from the first two counts of the Complaint in Civil Cause
No. 8509 (which are grounded upon the voidness or voidability of the
Contract for Deed because of corporate incapacity and/or improper
authorization), the primary basis for the lawsuit was an inequitable
disparity in the valuations of the two farms involved in the transaction
resulting in an unjust enrichment of Mr. Bouma and other at the expense

of the corporate estate. Various counts of the Complaint sound in different areas of equity, however, all are bottomed upon the assumption that in the process of the corporation's selling farmland, taking another farm in on trade, and eventually selling the traded-in farm to certain relatives of Ralph Bouma, the farms were valued improperly such as to result in a loss to Larry C. Iverson, Inc. of well over \$100,000.00 based upon true market values of the two farms. At the hearing of this court upon the petition of the stockhilders of Larry C. Iverson, Inc., asking the court to order the Receiver to file the suit in question, the stockholders made reference to a professional appraiser they had hired. His conclusions were represented to be that on July 17, 1968 (the date of the Bouma contract), the market value of the corporation's farm was \$791,000.00, and the value of Bouma's trade-in farm (Agawam)

was \$130,000.00, resulting in a market value difference of \$661,000.00. The stockholders then made reference to the fact that the Bouma contract actually undervalued the Iverson farm at \$735,000.00 and overvalued the Agawam or trade-in farm at \$216,000.00, for a contract difference of \$519,000.00. This resulted in a "loss" to Larry C. Iverson, Inc., of approxiamtely \$142,000.00. Because of this stated fact, because of the findings of fact in the above-entitled actions regarding the persons found to have been in control of corporate affairs, and because of other representations to the court by the stockholders of much evidence of inequitable involvement by Ralph Bouma, the Receiver was ordered to file the lawsuit.

During the course of the lawsuit, the deposition of Mr. Hoover, the appraiser who had been hired by the stockholders, was taken by Mr.

Bouma and his counsel. As a result of that deposition, some degree of doubt was raised in the mind of the Receiver and his counsel regarding the ability of the appraiser and the validity of his work in this particular instance. These feelings were discussed with the attorneys for the stockholder bands who reluctant agreed that a new appraiser should be hired to fortify the results of the first one. As a result a Mr. Murray, MAI Appraiser, was hired and completed an appraisal of the two properties in July of 1976, appraising then however as of July 17, 1968. His opinion is that the corporation's farm at that time was worth \$709,000.00 on the market and the trade-in Agawam farm was worth \$199,000.00, for a net difference of \$510,000. In apparently in his opinion the corporation would have recother wor. eived a benefit of approximately \$9,000.00 over actual market prices

under the Bouma contract.

In the meantime, in preparation for tial, Mr. Bouma hired the services of two independent appraisers, a Mr. McKay and a Mr. Hofland who concluded that the net difference to the corporation in market values of the two pieces of land were \$447,000.00 and \$502,000.00, respectively, both less than the contracted difference. A tabulation of the contract values and the appraised values by all appraisers is as follows:

1968 VALUES

| | AGAWAM | IVERSON | DIFFERENCE |
|----------|--------------|--------------|--------------|
| CONTRACT | \$216,000.00 | \$735,000.00 | \$519,000.00 |
| HOOVER | \$130,000.00 | \$791,000.00 | \$661,000.00 |
| MCKAY | \$188,000.00 | \$635,000.00 | \$447,000.00 |

| HOFLAND | \$174,000.00 | \$676,000.00 | \$502,000.00 |
|---------|--------------|--------------|--------------|
| MURRAY | \$199,000.00 | \$709,000.00 | \$510,000.00 |

Simply as an exercise, it is interesting to note that the actual average of all figures for the Agawam farm is \$172,750.00, for the corporation's farm is \$702,750.00, the average difference being \$530,000.00. For each series of valuations, if the high value and the low value are excluded, the average of the remaining values for the Agawam farm is \$187,000.00, for the corporation's farm is \$706,666.00, and the difference would be \$519,666.00, or nearly an identical figure to the actual contracted difference.

The Receiver is not contending that the contract valuations were correct nor that any given appraisal, with the exception of Mr. Hooever's, is good or bad. However, he and his counsel are of the opinion that it would be extremely hard to prove that the valuation

difference was actually enough higher than the contracted difference to be outside of the range of a normal sale which could have been bargained by any buyer and seller of similar property at the time of the contract. As such, the chances of proving appreciable damage to the corporation estate so as to move a court of equity would be slim. In other words. even assuming that Mr. Bouma could be proven to have very unclean hands, a court of equity may have a great deal of difficulty in taking the land away from him and adjusting accounts, or even re-forming the contract, if the corporation is not provably worse off because of his actions.

In fairness, the Receiver does acknowledge that such an opinion is a matter of professional legal judgment, and there does exist a certain degree of latitude for other attorney's opinions. In fact,

the opinions of the counsel for the stockholders of Larry C. Iverson Inc. do differ somewhat.

END OF EXCERPT

APPENDIX N

EXCERT FROM THE DISPOSITION OF ROBERT KELLER PRESIDING JUDGE

VS

IVERSON AND FARMERS STATE BANK OF CONRAD

VS

IVERSON, CONSOLIDATED Cause Numbered 8221/8073

9th Judicial District, State of Montana Pondera County Q I would like to direct your attention, Mr. Keller, to a statement in Defendants' Exhibit No. 53 and have you compare that with what is in the transcript.

(PAUSE TO COMPLY)

- A Okay.
- Q Do you have any place that you find in the transcript, the term-inology which we see here at the early part of the instrument on the second page of Defendants' Exhibit No. 53, where it speaks of line 4?
- A No
- Q On page 1026, Volume 5, of the transcript, the record does not show what occurred? page 1026 starts as follows, and then it says: "Mr. Stevens," do you see that?

- A Yes.
- Q And then it goes on, it quotes what's in here, I believe?
- A Yes.
- Q "I have no further questions." That paragraph seems to be a quote directly from the transcript, doesn't it?
- A Yes
- Now, then, it says here, "Mr. Treadaway." Do you see that in there? It says, "Yes, Your Honor," so does that appear to be a quote from the transcript:
- A Yes
- Q Okay, now, then, it says in Paragraph 5, "The following occurred in open court, But was not recorded." Do you see that?

A Yes

Now, do you see that recorded in the transcript?

A No

Do you recall any statement to the effect that we see in the Q terminology of our Defendants' Exhibit No. 53, where it says: "The following occurred in open Court, but was not recorded," and it says: "Mr. Treadaway, how long do you thing it will take for the presentation of your defense?" Mr. Treadaway: Well. the plaintiff has taken 22 weeks to present their case, and I anticipate that it will tkae us about the same length of time to put on our defense." "The Court: Mr. Treadaway, you may be sitting in this court for the next 21/2 weeks, but I certainly am not going to be here; in fact, I have checked out of the

motel and I will be on my way to Kalispell at 5:00 o'clock this afternoon." Do you recall that incident happening in open court?

- A No.
- Q Would you deny that it did happen?
- A In open court, in that manner?
- Q Yes.
- A Yes, There isn't any question taht the tenor of the discussion could have been held and it would certainly have been in jest. This is the third session we had had in Conrad for this thing, which means that I'm prepared to go over there for as long as I have to go, and I don't know what day that occurred, but whatever day it was, it was a time when they all anticipated that we would be done, and I'm booked, so it means coming back again. Nowhere did it come like

- this. This comes out like they're cut off, and I submit to you that the part that is in the report in the record is the question of where are they going to go in their defenses, together or separately, and they intend to go the way they're going.
- Q Whether, it was put on the record, or whether it was not put on the record, whether it was in jest or whether it was meant, do you deny that such terminology could have taken place at that interim?
- A At that interim?
- Q At the time when the plaintiff rested their case and we were looking to a defense:
- A Yes, I'd deny that. The only time this could have occurred like that would have been at a break in chambers and a question of how much longer do we go and how we reschedule if we can't get done today.

- Now, if other witnesses besides Krull and Treadaway were present-and also remember it as Mr. Treasway and Krull have put in their
 affidavit -- that they also remembered that, that it happened
 exactly that way, would it be your contention, then, that you
 flatly deny, or do you say that it is possible that it was
 misunderstood, or what is your explanation of that?
- A Well, who else are you talking about?
- Q Well, we'll say, for an example, if I could produce as many as ten witnesses that would say they remembered it exactly that way?
- A Ten Witnesses?
- Q If I could produce that may. I'm using a hypothetical.
- A Well, that's what I'm trying to ask you. Who are you talking

- about now is impeaching testimony, so I want to know who is it that says that I said that?
- Q Okay, if I would tell you that Ralph Bouma was present and would testify that that happened, would you say that it's absolutely not true?
- A Yes
- Q If Ralph Bouma's parents were both present and would say that that happened, would you say it's not true?
- A Yes
- Q If Mr. Bill May was present and would say that it happened, would you say it's not true?
- A Then I would re-examine my whole card.
- Q What about Sandy McCracken, if he would say that he was present

and it happened, would you deny that it's true?

- A Just as it says here?
- Q Well, relatively the same, yes.
- A Well, no, is this the way that they say it occurred? I said if something happened in jest, but it's not complete. Nothing about this transcript is consistent with this. The opening of it says, do you want to have it separately, or do you want to have it together? The close of it, when they're finally done, I'm surprised that they're done when they're done. The last page of the transcript indicates a surprise. I didn't think they would quit when they quit. The whole proceeding on this thing, starting back with the preceding summer, indicates that I have trudged back across that Divide in the worst weather again and again

and to say that this thing comes out that they're going to be limited and that's that, that's incredible, just simply incredible, so if anybody says that I said it in that manner, then I say they're wrong.

- Q If it were off the record and was in jest, would it make it that it didn't happen?
- A Oh, no, no it doesn't make it that it didn't happen, but it wouldn't be in the way it's set forth here.
- Q But on the other hand, is it possible that this would have been reason why Krull and Treadaway may have made such a trememdously short defense, because they felt limited, or possibly took you seriously, if it was in jest:
- A No

- Q You don't feel that that caused them to shortcut their defense:
- A I want to tell you that if I told them specifically they only have so much time to do something, there would be a record of an objection by Treadaway. I think there'd be one by Krull. It would be no different than if I told you that you're limited, and don't recall you sitting still for any limitations during the course of the trial.
- Q But do you recognize that there are some things that we've been bringing out today all along, that when they got into an area and an objection was sustained, in every instance, they completely left the area and never did come back to it,
- A Well, you've picked out the examples where they left, and that's true.

- Now, those areas, along with this, would that not be an indication that they possibly felt limited and did't realize they weren't if, in fact, they weren't?
- A No. I would be glad to go through the transcript, but I'm sure there are times when objections are sustained and they went right on with it. You've picked out places where they quit and didn't come back, but that doesn't mean that that's all the places. As I recall, it was John Treadaway who brought it up in jest, that it was going to take 2½ weeks, and that's what made the levity of the situation, but I don't recall that being an open court situation.
- Q But do you recall that there was a topic, whether it was in open court, or where, do you recall faintly that something of this nature occurred?

A I really do, and I can recall John bringing it up, too, but with a big grin and everything else right with it, that if the plaintiff has taken 2½ weeks, they'll have 2½ weeks, and we all laughed, and then there was a response. I just don't -- it's possible at the end of a trial like this that you could have that kind of levity in the courtroom itself, but I find it more realistic to be in chambers rather than in open court.

END OF EXCERPT

Office - Supreme Court, U.S.
FILED

APR II 1983

ALEXANDER L. STEWAS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

RALPH BOUMA and MRS. RALPH BOUMA,

Petitioner.

VS.

LARRY C. IVERSON, INC.,

Respondent

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

RESPONDENT'S BRIEF IN OPPOSITION

RAY F. KOBY, of Swanberg, Koby, Swanberg & Matteucci P.O. Box 2567 Great Falls, Montana 59403 Telephone: (406) 452-6415 Counsel of Record, and

CRESAP S. McCRACKEN, of Church, Harris, Johnson & Williams P.O. Box 1645 Great Falls, Montana 59403 Telephone: (406) 761-3000

Attorneys for Respondent

TABLE OF CONTENTS

| | Page |
|---|-------|
| DESIGNATION OF CORPORATE RELATIONSHIP | (ii) |
| TABLE OF CASES, STATUTES AND OTHER AUTHORITIES | (iii) |
| GROUNDS FOR OPPOSITION TO REVIEW ON CERTIORARI | 1 |
| STATEMENT OF THE CASE | 2 |
| SUMMARY OF ARGUMENT | 5 |
| ARGUMENT | |
| Grounds for Opposition One and Two, The Petition for Certiorari is not Timely | 7 |
| Grounds for Opposition Number Three, Res Judicata and Collateral Estoppel | 11 |
| Grounds for Opposition Number Four, Voluntary Payment of the Supreme Court Damage Award Moots the Question Raised in That Connection | 12 |
| Response to Mr. Bouma's Petition and Grounds for Opposition Number Five, Lack of Important Federal Question | 13 |
| CONCLUSION | 19 |
| APPENDIX | |
| Appendix A. Memorandum Opinion of United States District Court Judge James F. Battin in Cause VC-80-117-GF — Ralph Bouma et ux vs. Larry C. Iverson, et al | 1 |
| Appendix B. Memorandum Decision of United States Court of Appeals for the Ninth District, | |

| in Appellate Cause No. 81-3331, | |
|---------------------------------|----|
| affirming District Court Cause | |
| No. CV-80-117-GF | 12 |
| AFFIDAVIT OF MAILING | 14 |

DESIGNATION OF CORPORATE RELATIONSHIP

Respondent corporation has no parent, subsidiary, or affiliated companies. Shares of stock are owned by Farmer's State Bank of Conrad, Conrad, Montana, and United Bank of Pueblo, Pueblo, Colorado. These banks are owned respectively by The Conrad Company and United Banks of Colorado, bank holding companies.

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES

| CASES: | Page |
|--|------|
| Abood v. Detroit Board of Education, 431 U.S. 209 (1977) | 18 |
| Bonner v. Circuit Court of City of St. Louis, Docket 74-811, Eastern District Missouri | 15 |
| Campanella v. Bouma, 164 Mont. 214, 520 P.2d 1073 (1974) | 7 |
| Chelterham & Abington Sewerage Co. v. Pennsylvania Public Utility Comm'n, p.588 | 18 |
| Commonwealth v. Murphy, 295 Kentucky 466 | 15 |
| Cox Broadcasting Corporation v. Cullen, 420 U.S. 469 (1975) | 18 |
| Davis v. Crouch, 94 U.S. 514 (1876) | 18 |

| Department of Banking v. Pink, | |
|---|-----------|
| 317 U.S. 264 (1942) | 10, 18 |
| F.T.C. v. Minneapolis Honeywell Reg. Co., | |
| 344 U.S. 206 (1952) | 10 |
| Faretta v. California, 422 U.S. 806 (1974) | 16 |
| Farmer's State Bank v. Iverson, 162 Mont. 839, 509 P.2d 839 (1973) | 12, 18 |
| Garrison v. Lacey, 362 F.2d 798 | 16 |
| Golden Gate Lumber Co. v. Sharbacher, 39 P. 635 (Calif. 1894) | 17 |
| Gorman v. Washington University, 316 U.S. 98 | 18 |
| Johnson v. Mississippi, 403 U.S. 212 (1971) | 15 |
| Kramer v. Scientific Control Corporation, 534 F.2d 1085 | 16 |
| Miller v. McCarthy, 607 F.2d 854 | 16 |
| Patterson v. Colorado, ex rel Attorney General, | |
| 205 U.S. 454 (1907) | 11 |
| Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 | 15 |
| Price v. Johnston, 334 U.S. 266 (1948) | 16 |
| Priser, Comm. v. Newkick, 422 U.S. 395 (1975) | 13 |
| Sabatinelli v. Travelers Insurance Company, | |
| 341 N.E.2d 880 (Mass. 1975) | 17 |
| Smith v. Smith, 564 P.2d 1266 (Ariz. 1977) | 15 |
| In Re: Union Leader Corporation, 292 F.2d 381 | 15 |
| United States v. Corrigan, 401 F.Supp. 795 | 15 |
| Wick v. Superior Court, 278 U.S. 575 (1928) | 18 |
| STATUTES AND OTHER AUTHORITIES: Montana Rules of Appellate Civil Procedure | |
| Rule 29(b) | 17 |
| Rule 32 | 5, 12, 17 |

United States Code

| Title 28, Section 1257(3) | 13 |
|--------------------------------|----|
| Title 28, Section 1654 | 16 |
| Title 28, Section 2101 | 2 |
| Title 28, Section 2101(c) | 10 |
| 3A Am.Jur.2d, Federal Practice | |
| and Procedure 8760 | 10 |

In the

Supreme Court of the United States

OCTOBER TERM, 1982

RALPH BOUMA and MRS. RALPH BOUMA,

Petitioners.

VS.

LARRY C. IVERSON, INC.

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

RESPONDENT'S BRIEF IN OPPOSITION

GROUNDS FOR OPPOSITION TO REVIEW ON CERTIORARI

1. This Court has no jurisdiction to examine a 1981 Montana

Supreme Court final decision governing Bouma's substantive claims on a Petition for Certiorari filed in 1983 (Section 2101, Title 28, United States Code).

- 2. For the same reason, this Court may not now examine the procedure involved in or leading up to the 1981 Montana Supreme Court decision (Section 2101, Title 28, United States Code).
- 3. The Bouma application for certiorari seeks to relitigate matters unsuccessfully presented at length in a Civil Rights action in the United States District Court for the District of Montana. He lost in both the District Court and on appeal in the Ninth Circuit; he should be held barred by the doctrine of res judicata and the doctrine of collateral estoppel.
- 4. Bouma's voluntary payment of the Montana Supreme Court nominal damage award for frivolous appeal has mooted the question he seeks to raise concerning the propriety of the award.
- 5. Bouma presents no substantial question, new to federal law, upon which this Court needs to rule.

STATEMENT OF THE CASE

Ralph Bouma is the disappointed loser in litigation under which Larry C. Iverson, Inc. recovered from Bouma a Pondera County, Montana wheat ranch of substantial value. Supported by his wife (who has no direct interest in the matters before this Court)¹ Bouma seeks certiorari to undo the results of 19 years of hard fought litigation in the Montana Court system highlighted from time to time by sidetrips into the Federal Courts.

One of these sidetrips into the Federal Court system was initiated by Mr. Bouma as a civil rights action in October 1980.

¹ Because Mrs. Bouma has no direct interest in the void contract, the farm, or case, our further reference to "Bouma" will be to Mr. Bouma unless the text indicates otherwise.

The allegations of this Petition for Certiorari substantially rehash the allegations made in that litigation. The civil rights suit was dismissed for lack of substance by the Federal District Court and that result was affirmed by the Ninth Circuit Court of Appeals.

Though the history is extensive, convoluted and detailed the highlights might fairly be presented as follows:

Respondent Larry C. Iverson, Inc. is a Montana corporation organized to own the Iverson family Pondera County wheat ranch. The original incorporaters fell upon hard times. The stock of the corporation with one small exception in favor of an Iverson daughter is now owned by two banks which acquired stock through Sheriff's sale and by a bankruptcy trustee who acquired stock due to operation of the bankruptcy laws.

During the hard times just mentioned, the corporation came under the malevolent influence and defacto control of two self-dealing "consultants" from Phoenix, Arizona. These gentlemen, by one means or another, cashed out substantially all of the assets of the corporation and appropriated the proceeds. The farmland in dispute with Mr. Bouma is the only substantial remaining asset. This sordid story is the subject of Judge Robert S. Keller's 1971 Order reprinted in its entirety as Volume II of the Bouma Appendix.

Bouma's present position and predicament arise out of a void "sale" of the farm from the corporation (acting through the Phoenix consultants) to Mr. Bouma done in the summer of 1968 without any proper regard for the basic requirements of Montana law. The laws involved are those designed to protect corporate stockholders from corporate management and corporate mismanagement. Nevertheless, both the law and the stockholders were ignored to the ultimate benefit of Mr. Bouma and the gentlemen from Phoenix.

The two stockholder banks brought suits in the Pondera County, Montana, District Court in the late 1960's which were consolidated for trial and resulted in expulsion of the gentlemen

from Phoenix and establishment of a liquidating receivership set up by the 1971 Order by Judge Keller previously referred to.

Upon Court direction the receiver sought to recover the farm by suit against Bouma instituted in December 1971. Those proceedings are now completely terminated insofar as the Montana Court system is concerned. They resulted in recovery of the farm for the corporation as a result of summary judgment against Mr. Bouma entered in September 1979 in favor of the corporation which by that time had been substituted for the receiver as the named party Plaintiff.

The September 1979 summary judgment voided the Bouma purchase contract, ordered restoration of the farm to the corporation and required further proceedings to extract from Mr. Bouma an accounting for more than 10 years worth of crops and oil revenues. The accounting was done during 1980 and concluded in October of that year. Upon conclusion of the accounting the final District Court judgment was entered and thereupon appealed to the Montana Supreme Court by Mr. Bouma.

Mr. Bouma lost his appeal of the District Court summary judgment, the results of the accounting and, further, he lost the accounting issues raised by Iverson's cross-appeal. The case was decided by the Montana Supreme Court in November of 1981. Rehearing sought by Bouma was denied by the Montana Supreme Court January 11, 1982. This is a final decision and not subject to further appeal in the Montana Court system. No Petition for Certiorari with respect to the 1981 decision was ever filed. But see: Application for stay denied in this Court February 26, 1982, Docket No. A-745.

Because of the Bouma loss, the cross-appeal victory of Iverson, and the lapse of time required for the appellate process, a further mini-accounting was required. For that purpose *only* the Montana Supreme Court remanded to the trial court. Those proceedings were concluded by the end of February 1982. Bouma attempted a second, unsuccessful, Montana Supreme Court appeal. The appellate decision (rendered on briefs) was entered

December 2, 1982 and rehearing was denied December 16, 1982.

In the 1982 decision the Montana Supreme Court classified Mr. Bouma's efforts as frivolous and in accordance with its published court rule, Rule 32, Montana Rules of Appellate Civil Procedure, damages in the nominal amount of \$500.00 were assessed against Bouma. This is the second such penalty. Mr. Bouma paid \$1,000.00 in 1973. The taxable costs incurred and the \$500.00 damage award have been voluntarily paid by Mr. Bouma. No compulsory process has issued.

Because we question the timeliness of Mr. Bouma's Petition for Certiorari we quote from the 1982 decision² of the Montana Supreme Court, reprinted in the Bouma papers as Appendix "D" and from that source, at Volume I, Page 104 direct the Court's attention to the following:

"... Ralph Bouma, representing himself, stated, 'The real issue is yet whether or not they can take possession of my farm'... Mr. Bouma has failed to realize that this issue was completely and *finally* resolved in our prior [1981] decision.

Mr. Bouma is seeking nothing more than relitigation of issues already settled. We remind Mr. Bouma that the law cannot, and will not, be distorted to satisfy the personal whims of one man.

The appeal is hereby summarily dismissed as frivolous and damages . . . are hereby assessed . . ." [emphasis by the Montana Supreme Court]

SUMMARY OF ARGUMENT

Of the six issues sought to be presented by the Bouma Petition, four were determined as matters of absolute finality in the Montana Supreme Court in its 1981 decision. (Nos. 1, 2, 4 and 5) Those issues are time-barred for consideration in the United States Supreme Court under certiorari. Mr. Bouma can neither dredge them up nor breathe life into them through an effort to

² Locally printed only. 39 St. Rptr. 2125.

connect them to the 1982 decision. Beyond that, old issues 1 & 2 have been separately and independently examined in the United States District Court for the District of Montana and the Ninth Circuit Court of Appeals in the context of a Civil Rights action brought by this same Mr. Bouma against this same Larry C. Iverson, Inc. Mr. Bouma advocated but lost those issue in those Courts; he ought not to be allowed to make the United States Supreme Court the fourth Court to consider these matters.

One of the two new issues (No. 3) deals with the qualifications of the trial court to hear the mini-accounting, a clerical matter directed by the 1981 Supreme Court remand. Mr. Bouma contends he was deprived of due process though he had a full day of hearing before the specially appointed Judge, Honorable Mark Sullivan, to make what showing he could respecting the prejudice of the Judge, Honorable Leonard Langen, about to proceed with the mini-accounting. The other new issue (No. 6) is the award of nominal damages for a frivolous appeal which has been mooted by Mr. Bouma's voluntary payment and is, in any event, a de minimus matter.

Mr. Bouma's fifth issue, because it post-dated his Civil Rights filing, was not an issue in his Civil Rights case. But the fifth question, whether or not Ralph Bouma might personally argue before the Montana Supreme Court is out of time for the same reason that everything else prior to the 1981 decision is out of time.

ARGUMENT

Counsel for Respondent appreciate the potential under Rule 23.1, Supreme Court Rules that this Court's first order may be a summary disposition on the merits of the case. Accordingly our argument will include matters supporting opposition to the grant of a Writ of Certiorari and arguments answering the affirmative matters relied upon by Mr. Bouma.

Grounds for Opposition One and Two The Petition for Certiorari Is Not Timely

From 1968 to 1982 Ralph Bouma was in continuous possession of a Pondera County, Montana wheat farm claiming the right to be there and have the proceeds of the farm by virtue of a void Contract for Deed. As a result of earlier proceedings, Mr. Bouma was sued for the corporation by its receiver in an action designed to have the Bouma contract declared void. The action further sought recovery of possession and an accounting of the proceeds of the premises during the years of the Bouma occupation.

In trial court Mr. Bouma lost on September 25, 1979. The decision the trial court made that day ruled that the Bouma contract was indeed void, that the Iverson Corporation owned the farm and it was entitled to possession. The parties were ordered to account between themselves for the payments Mr. Bouma had made over the years and the proceeds Mr. Bouma had taken unto himself during that period of time. After a number of procedures toward this end the accounting was completed and decreed by the trial court in October 1980. Subject to appeal to the Montana Supreme Court the trial court aspect of this matter concluded at that time.

Bouma did appeal the trial court decision to the Montana Supreme Court. Respecting certain elements of the accounting, the Iverson Corporation filed a cross-appeal.

From the beginning of the action to recover the farm by the receiver for the Iverson Corporation, Ralph Bouma has represented himself and he has provided counsel for Mrs. Bouma. The Montana Supreme Court commented on this in *Campanella v. Bouma*, 520 P.2d 1073 at p.1075-76. The case before the Court at the time was an intermediate appeal and the Court said:

"The Court has no real interest or right in questioning his [Bouma's] judgment or motives unless and until his conduct of his own case seriously approaches the point of hampering or impeding the administration of justice or the rights of

other parties before the Court. We are now at that point. Specific instances shall go uncited at this time, however it is apparent that in the past Mr. Bouma has used his lack of representation to his advantage in these proceedings and has also used the fact of hs wife's representation also to his advantage."

Mrs. Bouma was originally joined in the 1971 action to recover the farm to eliminate any question of a claim of dower she might have in the Iverson farm. In 1974 Montana adopted the Uniform Probate Code and repealed its dower statutes. Subsequently a motion was made by the Plaintiff to dismiss Mrs. Bouma from the litigation but because Mr. Bouma resisted this, the motion was ultimately withdrawn. The only logical reason for resisting her dismissal was to continue the arrangement of a combination pro se appearance by Mr. Bouna with the assistance of a lawyer ostensibly representing Mrs. Bouma. Mrs. Bouma has never been, and is not now, a named party to the Contract under which Bouma claims the farm.

With that background in mind the Montana Supreme Court did decline to hear Ralph Bouma personally argue his case and asked that Mr. Gale Gustafson, counsel for Mrs. Bouma over many years present the matter to the Court. Mr. Gustafson was of course present. He stepped into the breach to fulfill this function.

The ultimate result was a Montana Supreme Court decision handed down November 17, 1981 affirming the lower court's adjudication that the Bouma Contract was void, affirming the ownership of the ranch in the Iverson Corporation and affirming as to all of the accounting questions raised by Mr. Bouma. The Court granted two out of the three points respecting the accounting as raised by the Iverson Corporation on cross-appeal. Inasmuch as the accounting in trial court had gone no farther than the end of crop year 1978 and because several items had to be determined with respect to the issues upon which the Iverson Corporation prevailed on cross-appeal, the Montana Supreme Court remanded the case to the trial court for further accounting proceedings strictly in accordance with the opinion issued. That opinion is published at 639 P.2d 47 and appears as item "B" in the

Bouma Appendix, Volume I, Page 28. It is important to note that by this decision the question of who owned the farm and who is entitled to possess the farm were determined with finality within the Montana Court system.

Mr. Bouma was aware of the finality of the Montana proceedings and the time allowed for certiorari in this Court on or before February 25, 1982. He filed an application for stay before Justice Rehnquist. ("Denied, W.H.R. 2/26/82"). This application raised the matters. Bouma now seeks to litigate under his issues 1, 2 and 5 and contemplated petition for certiorari by April 11, 1982. He did not file. He knowingly let his time go. See this Court's Docket No. A-745.

Mr. Bouma did continue his fight in the Montana Court system. He had previously exhausted his peremptory challenges to presiding Judges under the Montana Fair Trial laws. Accordingly Mr. Bouma undertook an attempt to show actual bias and prejudice on the part of the sitting trial Judge, Honorable Leonard Langen of Glasgow, Montana. Mr. Bouma filed the necessary papers to this end and by Supreme Court appointment his papers and his proof were brought for hearing before a Judge from Butte, Montana specially appointed for the purpose.

The Judge from Butte, Honorable Mark Sullivan, entertained all of the evidence Mr. Bouma wanted to present, but ruled that it failed to establish bias or prejudice on the part of Judge Langen. Mr. Bouma thus failed in his effort to disqualify Judge Langen.

A few days later Judge Langen sat on the mini-accounting and by scrupulously following the mandate of the Montana Supreme Court rendered a final monetary judgment between the parties which updated the accounting in all respects and allowed for those items ordered in favor of the Iverson Corporation by the Supreme Court. The actual numbers of dollars were stipulated. An orderly, peaceful transition of possession was prescribed and a time for disbursement of monies was appointed. These things have been done.

Mr. Bouma again appealed to the Montana Supreme Court and again attempted to raise the issue of hs right to ownership and possession of the farm. He claimed no error in the miniaccounting. The Montana Supreme Court pointed out that the lower court, Judge Langen, had little more than a clerical function to perform and had done just that making "... no substantive or procedural decisions ... "What Judge Langen did was "Acting under this Court's specific instructions, Judge Langen modified the accounting decree." The Court went on to point out to Mr. Bouma what should have been obvious: That the 1981 decision had completely and finally resolved the issues he sought to press and press again. These are the same substantive issues he now seeks to bring before this United States Supreme Court though they are now two years gone.

On this basis we are satisfied that with the exception of questions numbered 3 and 6 in Bouma's list of questions for review, all of Mr. Bouma's questions are time barred under 28 United States Code 2101(c). That statute allows 90 days for a Petition for Certiorari and is, on its face, jurisdictional. This Court has so held in the past. See F.T.C. v. Minneapolis Honeywell Reg. Co., 344 U.S. 206 (1952) and Department of Banking v. Pink, 317 U.S. 264 (1942).

Mr. Bouma lost the farm by summary judgment in 1979 and this was affirmed by the Montana Supreme Court in 1981; if Mr. Bouma had any federal questions to raise in aid of reclaiming the farm he should have applied for certiorari two years ago. He did not do so. Accordingly this Court is without jurisdiction to afford Mr. Bouma the primary relief he seeks as to all substantive matters as well as most procedural matters.

Grounds for Opposition Number Three— Res Judicata and Collateral Estoppel

Ralph Bouma and his wife brought a Civil Rights suit in the United States District Court against Larry C. Iverson, Inc., and others including the counsel undersigned and various of the trial Judges involved in this case from time to time. See Respondent's Appendix "A". The suit was filed and an application for temporary restraining order argued, on the same day, October 6, 1980. The date is significant because October 7, the following day, was the day set by the presiding trial Judge Langen in State Court upon which the accounting matters would first be finalized. The temporary restraining order was sought to block the matters in State Court. It was denied by United States District Judge Battin and the State matters were completed on schedule.

Thereafter motions to dismiss were made and briefed. Argument was conducted in the United States District Courtroom at Billings, Montana. The result was a dismissal with prejudice by the District Court, later affirmed by the Ninth Circuit Court of Appeals in an unpublished memorandum in its Docket 81-3331 filed June 21, 1982. See Respondent's Appendix "B".

Relying on the opinion of the United States Supreme Court in Patterson v. Colorado, ex rel Attorney General, 205 U.S. 454, 461 (1907) the Ninth Circuit specifically addressed the matters urged by Mr. Bouma under this present questions for review one and two. The language of the Court reads:

"The Boumas contend the State Courts deprived them of due process: (1) by construing the Montana Corporate Code to require nullification of contracts entered into without strict compliance with that Code; and (2) by giving collateral estoppel effect to findings of fact and conclusions of law of former judgments to which the Boumas were allegedly strangers. These arguments are without merit. The assertion that a State Court decision is incorrect and contrary to prior State Court decisions does not present a question for Federal review. The District Court properly concluded that no Fourteenth Amendment violations had been presented."

Rather than detailing the allegations made by Mr. Bouma which closely parallel assertions found from place to place in the Petition for Certiorari, the Ninth Circuit summarized the entire matter saying:

"... mere conclusory allegations without reference to material facts are insufficient to state a claim under the Civil Rights Act. [citations omitted] We have reviewed the record and we agree with the District Court that the Boumas have stated only conclusory allegations of Civil Rights violations without reference to material facts. The motion to dismiss was properly granted."

Ralph Bouma's civil rights complaint runs to 71 pages and almost literally contains everything but the kitchen sink. It covers the present contentions of "bound by a prior Court decision"; "fraud on the Court"; "unforseen changes" in State Court civil procedures. It alleged the entire matter to be a massive conspiracy among the bench and bar.

Grounds for Opposition Number Four— Voluntary Payment of the Supreme Court Damage Award Moots the Question Raised in that Connection

Rule 32, Montana Rules of Appellate Civil Procedure has for many years provided for "Damages for appeal without merit." The rule has been unchanged since January 1, 1966 and since that date Ralph Bouma has been in and out of the Montana Supreme Court on numerous occasions. A similar fine was levied in 1973, Farmer's State Bank v. Iverson, 509 P.2d 839 (1973). He cannot fairly deny an opportunity for notice. With respect to the \$500.00 nominal damage award Mr. Bouma has applied to both Supreme Courts, Montana and United States, for a stay. He has been refused on each application. No compulsory process was ever issued to compel payment. Nevertheless, Mr Bouma finally did pay the damage awards and the taxable costs assessed.

Our research would indicate that neither this Court nor any appellate Court at any level will ordinarily entertain moot questions in the absence of some compelling public reason to express an opinion. This Court will dismiss on the grounds that

the issues are moot. There is no longer a "case or controversy" under Article III of the Constitution. *Priser, Comm. v. Newkick,* 422 U.S. 395 (1975). In acquiescing by payment, Mr. Bouma has waived his right to bother this Court with an essentially de minimus point.

Response to Mr. Bouma's Petition

- and -

Grounds for Opposition Number Five— Lack of Important Federal Question

As this Court's Rule 17 points out ". . . certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore." The questions raised must be federal in nature, important in their consequences, and special matters to which this Court should speak. Such circumstances are simply absent from the Bouma presentation.

The jurisdiction under certiorari empowering this Court to review the actions of State Court systems arises out of the grant in 28 U.S. Code 1257(3). Reading of that section would indicate that the only toe-hold the statute grants to Mr. Boumas arises out of the phrase ". . . title, right, privilege or immunity especially set up or claimed under the constitution . . . [of] the United States." Mr. Bouma simply concludes and then asserts (rather than demonstrating) that "due process" has been violated in a number of ways. Those assertions can be examined by tracking Bouma's citations to Rule 17.1 of the Revised Rules of this Court. The citatons appear at Pages 27, 40, 42, 46, 47, and 50 of the Bouma Petition.

At Page 27 Bouma refers to Rule 17.1(c) in connection with his contention that though he was not a party he was bound by a fraudulently obtained decision in a prior action. In his Civil Rights action he made this contention before the United State District Court and in the Ninth Circuit. Both Courts expressly

considered the point and expressly disallowed it because indeed Mr. Bouma was not held bound by any prior decisions in which he had any legitimate interest.

At Page 40 of his Petition Mr. Bouma cites and relies upon Rule 17.1(c) of this Court's Rules in connection with his contention that his right to due process was violated by virtue of the failure to disqualify Judge Langen. He is the trial Judge who had previously ruled adverse to Mr. Bouma on the summary judgment and had made accounting decisions with which Mr. Bouma disagreed. The decisions with which Mr. Bouma disagreed were put to rest by the 1981 Montana Supreme Court opinion. The disqualification motion came when the matter was remanded for the mini-accounting to update and modify the decree in accord with the Supreme Court decision.

It is apparent from the Montana Supreme Court's 1982 opinion that Mr. Bouma's matter was indeed duly processed. He had his "day in Court" and appellate review. A special Judge was appointed to hear his evidence of actual bias and prejudice. A transcript was prepared concerning that hearing which was reviewed by the Montana Supreme Court at Mr. Bouma's instance. In this connection the Montana Court said, quoting from Volume I, Page 103-104 of the Bouma Appendix:

"After Judge Langen set the date for a hearing to modify the accounting decree, Appellants filed an affidavit to disqualify Judge Langen. . . . [this Court] ordered Honorable Mark Sullivan to conduct disqualification proceedings. Judge Sullivan found no showing of prejudice or bias on the part of Judge Langen. . . .

The transcript of the disqualification proceedings shows the real purpose underlying Mr. Bouma's attempts to postpone the resolution of this case. In final statements before Judge Sullivan, Ralph Bouma, representing himself, stated 'The real issue is yet whether they can take possession of my farm.' (Transcript of hearing before Judge Sullivan, February 23, 1982, pg. 150)."

At Page 42 of his Petition Bouma again invokes Rule 17.1(c) of the Rules of this Court. He does so in the context of accusing the Montana Supreme Court of being "so enmeshed" that it could not render an unbiased decision. On the preceding page Mr. Bouma had said in reference to the Montana Supreme Court that "... five of the seven justices were named in a Civil Rights action by the buyers... also they were named as possible defendants in an affidavit requesting the empaneling of a grand jury. "Contrary to the extreme facts in *Johnson v. Mississippi*, 403 U.S. 212, (1971) neither the Montana Supreme Court nor any of its justices were named as defendants in Mr. Bouma's Civil Rights suit. Bouma's reliance on the case is misplaced and misguided.

When Bouma prepared his grand jury affidavit, he did so on the caption of, and the docket number of, the Civil case before Judge Langen. Bouma Petition, p.41. He, the Judge, was presiding as a replacement for the local judge, Honorable R. D. McPhillips who had been disqualified by Bouma years before.

The effect of the affidavit was to ask Judge Langen to call a grand jury to investigate Bouma's enemies. It was denied as to this relief and then filed by the Clerk in the Civil suit by order of the Judge. Bouma's effort is not consistent with Montana practice as a whole. We rarely mix civil and criminal matters. Replacement Judges do not usually call grand juries in the territory of others.

Both the Civil Rights complaint and the affidavit seeking the grand jury were voluntary acts taken by Mr. Bouma exercising his judgment as attorney pro se. It is abhorent to our concepts of law that a party such as Mr. Bouma can voluntarily and under the cloak of privilege, defame the Courts in which he chooses to litigate with the intention of later seeking to employ this as a basis of disqualification. Cases so holding include United States v. Corrigan, 401 F.Supp. 795, 798 (citing unpublished Bonner v. Circuit Court of City of St. Louis, Docket 74-811, Eastern District Missouri); Smith v. Smith, 564, P.2d 1266, citing Ponder v. Davis, 233 N.C. 699, 65 S.E.2d 356 and In Re: Union Leader Corporation, 292 F.2d 381, and Commonwealth v. Murphy, 295 Kentucky 466. The general tenor of the citations is to the effect

that a party such as Mr. Bouma may not interrupt the orderly flow of the judicial process by ersatz actions such as his attempt at prosecution of so called Civil Rights claims or name calling in a "grand jury affidavit."

Mr. Bouma next relies on Rule 17 of this Court at Pages 45 and 46 where in substance he claims a denial of due process because the Montana Supreme Court did not allow him the privilege of personal oral argument in respect to the 1981 appeal. The 1981 appeal of course is beyond the reach of review by certiorari as time barred. Were it not so barred this Court would be ill-advised to undertake to expand the *Faretta* rule beyond its constitutional law/criminal law context. *Faretta v. California*, 42 U.S. 806 (1974).

As Faretta makes very clear, the right of a party to appear pro se is federal and constitutional only in the context of state criminal law. See the opinion, 422 U.S. 806 at 831.

In the civil context, and applicable only to Federal Courts, the privilege of self representation is extended by 28 U.S.C. g1654. The further citations advanced by Mr. Bouma in support of his major premise, appearing at Page 43 of his Petition, simply do not support his contention. He has no right, constitutional or otherwise, to insist upon self representation to the point of being allowed to personally present oral argument in the Montana Supreme Court. Not even a prisoner has a right to personally appear to argue at the appellate level. *Price v. Johnston* 334 U.S. 266, 285 (1948).

Mr. Kramer of Kramer v. Scientific Control Corporation, 534 class F.2d 1085 was an attorney and the leading member of a class in an action represented by his law partners. The considerations were altogether different from those presented in this case. Mr. Garrison in Garrison v. Lacey, 362 F.2d 798 was a Federal prisoner who chose to be his own lawyer and apparently lived to regret it. Miller in Miller v. McCarthy, 607 F.2d 854 was a California prisoner who litigated ineffective assistance of counsel after hiring a lawyer to take an appeal. The complaint was that the

lawyer failed to take action or tell Miller how he could do the appeal himself.

All in all, it is obvious that Mr. Bouma has mis-stated the authority upon which he relies and indeed there seems to be no authority which does support his contention. Several state appellate courts have concluded that there is no constitutional right to oral argument. See Sabatinelli v. Travelers Insurance Company, 341 N.E.2d 380, at 882-883 (Mass. 1975); Golden Gate Lumber Co. v. Sharbacher, 39 P. 635, at 636 (Calif. 1894). Montana Rules of Appellate Civil Procedure 29(b) provides for regulation of argument to ensure that it serves the intended purpose of assisting the Court.

The attorney who did argue the case to the Montana Supreme Court in connection with the 1981 appeal, Gale Gustafson of Conrad, Montana, is the attorney who had for years "represented Mrs. Bouma" in connection with all of these proceedings. His experience in working as "co-counsel" with Ralph Bouma covered the better part of 10 years and he had participated in all of the proceedings which were within the scope of the appeal. A suggestion that Mr. Gustafson had inadequate preparation time is simply not candid; he came prepared to argue for Mrs. Bouma. "Her" position never varies from that of Mr. Bouma.

It is nowhere suggested that Mr. Gustafson's argument was in any respect incompetent or that Mr. Bouma suffered any prejudice in this respect. Mr. Bouma indicates nothing that Mr. Gustafson failed to present or presented but should have omitted. Bouma suggests nothing that might have been better presented had he personally addressed the Court. His objection is waived.

Mr. Bouma's last citation in reliance upon Rule 17.1(c) appears at Page 50 where he asserts that he has been deprived of property (\$500.00) without due process of law by being assessed for a frivolous appeal. Notice to Mr. Bouma appears in the rules of the Montana Supreme Court at Rule 32, Montana Rules of Appellate Civil Procedure. Mr. Bouma must have been aware of this

possibility. The same rule was invoked against him by the Montana Supreme Court in connection with the appeal of Farmers State Bank of Conrad v. Iverson, et al., 509 P.2d 839 (1973). See, Bouma Appendix, Volume I, p.54. He also paid that \$1,000.00 penalty voluntarily, without execution.

In connection with this argument Mr. Bouma makes the incredible statement that "If the buyers [Bouma] had been given a chance they would have shown the second appeal was not frivolous. They could have shown that the decision on the first appeal was not final under Title 28 U.S.C. §1257." Petition, p.49. Absolutely no one reading the 1981 Montana Supreme Court decision could possibly believe it was less than final except for the limited accounting issues specifically remanded to be done in the format of the mini-accounting.

"For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (Wick v. Superior Court, 278 U.S. 575; Cheltenham & Abington Sewerage Co. v. Pennsylvania Public Utility Comm'n, post, p. 588), but rather whether the record shows that the order of the appellate court has in fact fully adjudicated rights and that the adjudication is not subject to further review by a state court (see Gorman v. Washington University, 316 U.S. 98). Where the order or judgment is final in this sense, the time for applying to this court runs from the date of the appellate court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

Department of Banking v. Pink, 317 U.S. 264 (1942).

Although the decision on the first appeal modified the judgment in part, it was not modified in any way affecting the so-called federal questions Bouma seeks to raise. See Cox Broadcasting Corporation v. Cullen, 420 U.S. 469 (1975). The assignment on remand was essentially ministerial so the remand does not stay the time within which certiorari must be petitioned. Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

Bouma miscites Davis v. Crouch, (1876) 94 U.S. 514, which

dealt with the effect of a remand to determine liability. This Court said: ". . . In short, the judgment is one of reversal only, which . . . is not a final judgment in the suit." Opinion of the Court, p.516. The situation is not comparable to the action of the Montana Court. Bouma's central legal rights were not disturbed or revised in any substantial way on remand for mini-accounting. See 33A Am. Jur. 2d, Federal Practice and Procedure §760.

CONCLUSION

The Montana Supreme Court, by its decision of November 17, 1981 with rehearing denied January 11, 1982, decided finally that the District Court correctly determined Ralph Bouma's so-called purchase contract was void, that Mr. Bouma and the Corporation had a reciprocal duty to account each to the other and that, with minor exceptions, the accounting was properly done. Concurrently that Court decided that the matters Mr. Bouma now seeks to raise concerning (1) being bound by a prior State Court decision to which they were not parties; (2) matters of refusal of defenses of ratification and estoppel; (3) right to oral argument on appeal had no merit.

Implicit in the 1981 decision is the determination that it was within the right of the Montana Supreme Court to regulate oral argument before itself and require that Ralph Bouma be represented for that occasion by his wife's attorney of some ten years experience in the matter. The Montana Supreme Court has expressly determined that its decisions to that point were final as to Ralph Bouma and would not be the subject of further review or consideration in the Montana Court system. Bouma knew matters in the Montana Courts were "final" when he applied to this Court in February, 1982. See his application in this Court's Docket No. A-745, at Page 6, line 10.

Since then, in its 1982 decision, the Montana Supreme Court has approved the refusal to disqualify the trial Judge for actual bias after an extended hearing was provided and it has assessed Ralph Bouma \$500.00 in damages for a frivolous appeal under its Rule 32, Montana Rules of Appellate Civil Procedure.

If any legitimate federal issues lurk in Mr. Bouma's questions for review they were decided adversely to him in 1981 except for his issues 3 and 6. Issues 3 and 6 arise out of proceedings on remand final in 1982. They are undoubtedly timely for this Court's consideration. However, there is no violation of due process in the disqualification proceedings relating to Judge Langen. A complete hearing was had and a transcript prepared. The transcript was reviewed by the Montana Supreme Court which affirmed. Mr. Bouma had his day in Court both at the District Court level and at the Supreme Court level but he failed to prevail. That does not represent a deprivation of due process of law.

As to fining Mr. Bouma \$500.00 without notice or opportunity to be heard it may be suggested that this is the second fine Mr. Bouma has incurred and paid in 10 years under Rule 32 of the Montana Appellate Procedures. His plea of ignorance is unacceptable.

Petitioners have raised no substantial federal issues, and no federal issues have been timely raised. The petition comprises a massive collection of conclusions unsupported by fact.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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APPENDIX TO RESPONDENT'S BRIEF IN OPPOSITION

TABLE OF CONTENTS

| | TABLE OF CONTENTS | | |
|--------------------|---|-------------|--|
| APPENDIX AP LETTER | | PENDIX | |
| | | PAGE | |
| A. | Memorandum Opinion of United State District Court Judge James F. Battin in Cause CV-80-117-GF — Ralph Bouma et ux vs. Larry C. Iverson, et al. | t _ 1-11 | |
| В. | Memorandum Decision of United States Court of Appeals for the Ninth Circuit, in Appellate Cause No. 81-3331, affirming | | |
| | District Court Cause No. CV-80-117-GF | _ 12-14 | |

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA GREAT FALLS DIVISION CV-80-117-GF MEMORANDUM OPINION¹

RALPH BOUMA, and MRS. RALPH BOUMA, his wife,

Plaintiffs,

-vs-

LARRY C. IVERSON, INC., a Montana corporation; GEORGE CAMPANELLA, individually, and as Receiver for Larry C. Iverson, Inc.; UNITED BANK OF PUEBLO, a Colorado Banking corporation; CRESAP S. McCRACKEN, individually, and as counsel for United Bank of Pueblo, Larry C. Iverson, Inc., as partially reconstituted, and George Campanella, as Receiver for Larry C. Iverson, Inc.; HENRY WILLIAMS, individually, and as former President of the United Bank of Pueblo; FARMERS STATE BANK OF CONRAD, a Montana Banking corporation; CARL POHLAD, individually, and as controlling interest-holder of Farmers State Bank of Conrad; EARL M. BERTHELSON, individually, and as former President and current Director of Farmers State Bank of Conrad; RAY F. KOBY, individually, and as counsel for Farmers State Bank of Conrad and Larry C. Iverson, Inc. as partially reconstituted and George Campanella, as Receiver for Larry C. Iverson, Inc.; THE UNITED STATES DEPARTMENT OF JUSTICE; BENJAMIN R. CIVILETTI, individually, and as United States Attorney General; JO ANN HARRIS, individually, and as Chief of the Fraud Section, Criminal Division, United States Department of Justice; COUNTY OF PONDERA, a body politic of the State of Montana; DOUGLAS ANDERSON, individually, and as Pondera County Attorney; EVERETT ELLIOTT, individually, and as Chairman of the Board of Pondera County Commissioners; THE DISTRICT COURT OF THE NINTH JUDICIAL DISTRICT OF THE STATE OF MONTANA.

i filed by clerk of court April 24, 1981

IN AND FOR THE COUNTY OF PONDERA: BERNARD W. THOMAS, as Presiding District Court Judge in Pondera County Causes No. 8221 and 8703 as consolidated; LEONARD H. LANGEN, as Presiding District Court Judge in Pondera County Cause No. 8509,

Defendants

This is a case in which the plaintiff alleges civil rights violations occuring over the course of over a decade of state court litigation. For the reasons given below, we have determined that all of the named defendants' motions to dismiss should be granted and that all motions for summary judgment should be denied.

I. FACTUAL BACKGROUND

The facts of this case are lengthy and intricate, involving over twelve years of state court litigation and numerous county, state, and federal officials. The original problems arose affter Ralph Bouma, plaintiff in this federal action, entered into a land exchange transaction with Larry C. Iverson, Inc., a Montana corporation which was than having severe financial difficulties. Under the terms of the agreement, Bouma exchanged his cattle ranch for cropland owned by Larry C. Iverson, Inc. The ranch which Larry C. Iverson, Inc. acquired from Bouma was immediately sold at a public auction to Bouma's brother. At the time of the land exchange transaction, claims of numerous creditors were pending against Larry C. Iverson, Inc.; the ensuing nine years of litigation represent the struggles of two of these creditors, Farmers State Bank and United Bank of Pueblo, to rescind the transaction with Bouma as fraudulent.

In November 1970, defendant United Bank of Pueblo filed suit in Montana District Court of the Ninth Judicial District of Pondera County, seeking appointment of a receiver for Larry C. Iverson, Inc. and also the rescission of the 1968 land exchange contract. A similar suit by defendant Farmers State Bank was subsequently consolidated with this case. Bouma alleges that he was denied permission to intervene in this action, although there

is no record that a motion to intervene was ever filed. Bouma further alleges that the two banks, their officers, state court Judge Keller, and the banks' attorneys were involved in an elaborate mail fraud scheme to seize the stock of Larry C. Iverson, Inc.; the specifics of this scheme are outlined in a proposed "draft indictment" of the United States Attorney's office, an indictment which was later dismissed in federal court. On April 7, 1971, the state district court issued findings that George Campanella, also a named defendant here, should be appointed as a permanent receiver; that John C. Treadaway and J. Milton Krull, the officers of Larry Iverson, Inc. with whom Bouma negotiated the 1968 contract, should be removed from the board of directors; and that Treadaway and Krull had no financial interest in the 1968 contract.

Bouma alleges that this receivership action violated his due process rights by adjudicating his rights on the 1968 contract without his presence. But, according to the record, no such issues were ever decided, although the parties raised them in certain filed documents. Instead, on December 10, 1977, receiver Campanella filed a new action, Pondera County Cause No. 8509, against Bouma to rescind the 1969 contract. On March 24, 1978, the reconstituted Larry C. Iverson, Inc. was substituted for Campanella as plaintiff. Finally, on November 30, 1979, Judge Leonard H. Langen (the fourth state judge to sit on the litigation in Pondera County Cause No. 8509) granted Larry C. Iverson, Inc.'s motion for summary judgment, holding that the 1968 contract was void as an ultra vires act on the part of Krull and Treadaway and that Bouma knew or should have known of Krull and Treadaway's lack of authority.

Then, on October 6, 1980, plaintiff Bouma brought his plight before this Court, alleging that Campanella, the banks, two of the state court judges, county officials, federal officials, and several attorneys were all conspiring to violate his civil rights in contravention of 42. U.S.C. §§ 1983 and 1985 (1976). Specifically, Count I of Bouma's complaint alleges violations of 42 U.S.C. §§ 1983 and 1985 (1976) by the judges and participants in the state court litigation; Count II alleges jurisdictional defects in the state court decision which require that a temporary restraining order

issue; Count III alleges violations of 42 U.S.C. § 1986 by the United State Department of Justice for failure to protect Bouma from civil rights violations; Count IV alleges violations of 42 U.S.C. § 1986 by Pondera County officials for failure to protect Bouma from civil rights violations. On October 8, 1980, this Court denied Bouma's request in Count II for a temporary restraining order staying the state court proceedings. Now we are called upon to rule upon the motions to dismiss all four counts which have been filed on behalf of the eighteen named defendants.

II. COUNT I A. § 1983 Claims

Under Count I of his complaint, Bouma alleges the state court litigation has violated the following of his constitutional rights: "right to be free from conspiracy and bad faith prosecution, right to a fair and impartial trial, right to due process and equal protection of the law, and deprivation of valuable property rights." Complaint at pp. 16-17. The "right to be free from conspiracy" will be discussed below in our consideration of Bouma's § 1985 claims. We will deal with each of the other alleged civil rights violations giving rise to a cause of action under 42 U.S.C. § 1983 (1976) in turn.

First, we do not believe any of the facts alleged by Bouma in his complaint establish a denial of Bouma's "right to a fair and impartial trial" protected by the Fourteenth Amendment. As to the original receivership action, Bouma has not alleged that any of his property rights were adjudicated. As to Pondera County Cause No. 8509, initiated by the receiver against Bouma to rescind the 1968 land exchange agreement, there are no facts alleged which would establish that "fundamental fairness" had been violated. As other courts have noted, a party is "entitled to a fair trial but not to a perfect one." Frayer v. Turner, 296 F. Supp. 1256, 1257-58 (D. Wash. 1969), aff'd, 413 F.2d 546 (9th Cir. 1969); Opie v. Meacham, 293 F. Supp. 647 (D. Wyo. 1968), aff'd, 419 F.2d 465 (10th Cir. 1969), cert. denied, 399 U.S. 927. Admittedly, the complaint pleads that the lower court trial in Cause No. 8509 was riddled with errors:

- 1) A prejudical refusal to allow Bouma to intervene in the receivership action (Pondera County Cause N. 8221 and 8073);
- 2) An illegal reconstitution of Larry Iverson, Inc. to replace the receiver as plaintiff in Pondera County Cause No. 8509;
- 3) A refusal to impanel a grand jury to investigate the illegal acts of the banks:
- 4) An inadequate property valuation in Pondera County Cause No. 8509; and
- 5) A failure to properly reconstruct the transcript of a hearing in Pondera County Cause No. 8509 for which the court reporter's notes were stolen.

None of these facts, even when considered together, amount to prejudice so pervasive that Bouma's right to a fair trial has been affected. The alleged errors are all legal defects which can be adequately remedied on appeal.

Next, we will consider the alleged violations of due process. Many of these allegations go to the receivership action commenced by the banks (Pondera County Causes No. 8221 and 8073), but since this action adjudicated none of Bouma's disputed property rights he has failed to show a personal deprivation of a right secured by the Constitution. Lopez v. Luginbill, 483 F.2d 486, 488 (10th Cir. 1973), cert. denied, 415 U.S. 927 (1974). Instead, we turn to the due process violations alleged in the action by the receiver against Bouma to rescind the 1968 contract (Pondera County Cause No. 8509). Here, all of the due process violations may be summed up as conspiracy to commit legal errors which ultimately resulted in a decision unfavorable to Bouma. We do not find that these errors violate due process.

As stated by the United States Supreme Court, the fundamental requisite of due process is the opportunity to be heard prior to deprivation of a significant property interest. *Memphis Light, Gas and Water Division v. Graft,* 436 U.S. 1, 16 (1978). Even accepting Bouma's allegations of judicial error and conspiracy, we fail to see how his opportunity to be heard has been abrogated.

A federal court cannot find a due process violation by a state court for deciding a legal issue improperly. *Patterson v. Colorado ex rel. Attorney-General*, 205 U.S. 454, 461 (1907). As a federal court in the District of Virginia noted in considering a complaint with many of the same defects as Bouma's:

The due process clause does not guarantee that every decision reached will be factual or just; it only guarantees that the decision will be reached by processes which are fair. Thus, insofar as petitioner alleges an error in outcome, rather than in process, his petition must fail.

United States v. Wallace, 448 F. Supp. 164, 166 (D. Va. 1978). None of the facts alleged in Count I of Bouma's complaint establish a denial of Bouma's right to be heard. For this reason, we do not believe Count I adequately states a due process violation and hence the motions to dismiss Bouma's § 1983 claim must be granted.

Several of the Count I defendants seek dismissal of Bouma's § 1983 claim on the grounds of immunity, since they are alleged to have conspired with judges who are immune from suit. Clearly, a judge enjoys absolute immunity from suit under § 1983 while acting within the scope of his judicial duties. Pierson v. Ray, 386 U.S. 547 (1967). Although Bouma insists there can be no judicial immunity because the judges here acted outside the scope of their duties, the acts alleged consist of judicial errors which were within the scope of the judges' duties.

The remainder of the Count I defendants argue that because one of their alleged co-conspirators is immune from suit they themselves must be similarly immune under *Haldane v. Chagnon*, 345 F.2d 601 (9th Cir. 1965). However, the recent United States Supreme Court opinion of *Dennis v. Sparks*, 101 S.Ct. 183 (1980), seems to have overruled *Haldane*, stating that "private persons, jointly engaged with state officials in the challenged action, are acting 'under color' of law for purposes of § 1983 actions" and hence may not plead judicial immunity. *Id.* at 186. Based on *Sparks*, then, we must recognize judicial immunity as protecting the judges alone and not their co-conspirators.

The only exception to Sparks would be the receiver Campanella. A court-appointed receiver is a "quasi-judicial official" who is immune while acting "in obedience to lawful process of any sort." Bradford Audio Corp. v. Pious, 392 F.2d 67, 73 (2d Cir. 1968). Thus, even if Bouma could establish a g 1983 violation, receiver Campanella could plead immunity since any of acts of conspiracy he committed were done subject to a judge's approval.

Several of the defendants also plead an absence of in personam jurisdiction under the Montana Long-Arm Statute, Mont. R. Civ. P. 4B, involving (a) "the transaction of business within this state" or (c) "the ownership, use or possession of any property, or of any interest therein, situated within this state." United Bank of Pueblo, Henry Williams, and Carl Pohlad all claim to be beyond this Court's jurisdiction. Here the principal test, announced by the United States Supreme Court in International Shoe v. Washington, 326 U.S. 310 (1945), is whether a corporation receives such benefits as a result of the privileges of conducting business within a state to establish "minimum contacts" so that it may, in fairness, be called to respond to a suit in that state. Id. at 319. See Bullard v. Rhodes Pharmaceutical Co., 263 F. Supp. 79. 81-82 (D. Mont. 1967). Here the only contact of the United Bank of Pueblo is its involvement in a suit in Montana district court. The authority seems clear that state court litigation in pursuit of out-of-state obligations cannot subject a corporation to local jurisdiction. Dragor Shipping Corp. v. Union Tank Car Co., 361 F.2d 43, 49 n. 12 (9th Cir. 1966). Neither does United Bank's ownership of stock in Larry C. Iverson, Inc., a Montana corporation, support a claim of jurisdiction. Shaffer v. Heitner, 433 U.S. 186, 213 (1977). Likewise, defendant Carl Pohlad's ownership of stock in Conrad Co., which in turn owns stock in defendant Farmers State Bank, a Montana banking corporation, cannot subject Pohlad to this Court's jurisdiction. Still less can such allegations establish jurisdiction over Henry Williams, the inactive president of United Bank of Pueblo, who apparently does not even own stock in a Montana corporation and never personally subjected himself to this Court's jurisdiction.

Therefore, based on the fact that we believe no actionable civil

rights violations have been alleged, the defendants' motions to dismiss Count I must be granted.

B. § 1985 § 1986

Under 42 U.S.C. § 1985(3) (1976), if two or more persons conspire to deprive another of "equal protection of the laws" or of "equal privileges and immunities under the laws," these persons are subject to suit in federal court for damages under the jurisdictional statute of 42 U.S.C § 1988 (1976). To establish a cause of action under § 1985, a complaint must allege "some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). This the Bouma complaint does not do. Therefore, under the authority of such Ninth Circuit cases as Arnold v. Tiffany, 487 F.2d 216, 218 (9th Cir. 1973), holding that the acts complained of must be a product of class-based discrimination, we believe the Count I defendants' motions to dismiss the § 1985 claims must also be granted.

In a last effort to preserve a valid § 1985 claim, Bouma argues that he is the member of a family and a political group which is being discriminated against. In support of this motion, he cites Azar v. Conley, 456 F.2d 1382 (6th Cir. 1972) and Cameron v. Brock, 473 F.2d 608 (6th Cir. 1973). We believe both of these cases involved special instances of discrimination which do not appear in the facts alleged by Bouma. In Azar, eight family members brought suit against certain city officials for harrassment. None of the facts before us even hint that the civil rights violations here were caused by animus toward the Bouma family. Similarly, none of the facts of the Bouma complaint suggest the same brand of political discrimination which the Sixth Circuit found in Cameron.

Dismissing the claims under 42 U.S.C. § 1985(3) also disposes of Bouma's claims under 42 U.S.C. § 1986. The provisions of § 1986 give a cause of action against any person who, having power to prevent a § 1985 violation, fails to do so. Clearly, to establish a valid § 1986 claim Bouma must first establish a valid § 1985

claim. Hahn v. Sargent, 523 F.2d 461, 470 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). Having failed to adequately allege a § 1985 violation, Bouma has also failed to allege a § 1986 violation.

III. COUNT II

Since we have already denied the temporary restraining order requested in Count II by our Order of October 8, 1980, we need not dwell for long upon this count. The only other relief requested in this count is a declaration that the Orders of November 30, 1979, and September 9, 1980, by the Montana District Court in Pondera County Cause No. 8509 are null and void.

Here Bouma has concocted the novel theory that Selway v. Burns, 150 Mont. 1, 429 P.2d 640 (1967), a probate case in which a state court vacated one of its pior orders because of misrepresentations made by counsel, would allow this federal court to vacate a state court holding. As we explained in our October 8, 1980, Order denying the temporary restraining order, only exceptional circumstances can justify interference with a state court proceeding. October 8, 1980, Order at p. 3. Furthermore, we are aware of no authority whatsoever empowering a federal court to vacate a state court judgment based on alleged legal errors. Comity and federalism both prevent our intervention in the proceedings of the Montana district court.

We must further point out that most of the Count II defendants are judges or courts who, again, are immune under *Pierson v. Ray*, 386 U.S. 547 (1967). One of the other defendants, receiver Campanella, is also immune as a quasi-judicial officer under *Pierson*. Based on both absence of jurisdiction and immunity, we must also grant the Count II defendants' motions to dismiss.

IV. COUNT III

Count III alleges violations of 42 U.S.C. g 1986 (1976) by federal officials for the refusal to seek a mail fraud indictment against the banks and the bank officials involved in the state court litigation. As discussed above, this civil rights statute provides a cause of action for damages to anyone who permits a § 1985 violation to occur. Clearly, then, the failure of the Bouma complaint to adequately allege a § 1985 violation also defeats his § 1986 allegations.

Furthermore, the Count II defendants are all federal prosecutors who declined to impanel a federal grand jury to consider Bouma's allegations of mail fraud. As such, these officials are clearly immune from a § 1983 suit under *Imbler v. Pachtman*, 424 U.S. 409, 427 (1976): "The ultimate fairness of the operation of the [criminal justice] system itself could be weakened by subjecting prosecutors to § 1983 liability." For this same reason, we do not believe the prosecuting officials named as defendants here should be subject to suit.

It is true that *Imbler* did not address the issue of whether a prosecutor acting in his role of administrator or investigative officer would be subject to § 1983 liability. *Id.* at 431. However, other cases have held that even prosecutors engaged in the quasijudicial activity of deciding whether or not to prosecute fall under the *Imbler* immunity. In *Hall v. Flathead County Attorney*, 478 F.Supp. 644 (D. Mont. 1979), Judge Russell Smith held that a prosecutor could not be sued under § 1983 for deciding to prosecute or not to prosecute:

The problems of what evidence to believe, what evidence to present, what avenues of inquiry to pursue, and what cases to file, lie at the heart of the prosecutorial function, and decisions as to them are the kinds which ought to be the subject matter of second-guessing in a civil rights action.

Id. at 645, citing Imbler v. Pachtman, 424 U.S. at 424-25. We find ourselves in agreement with Judge Smith on this point. Thus, we believe all the prosecuting federal officials sued under Count III for their failure to seek federal indictments must be dismissed.

V. COUNT IV

Count IV is similar to Count III except that here the § 1986 violations for failure to prosecute are against county rather than

federal officials. Because no class-based discrimination is alleged, we have seen that Bouma's complaint fails to state a cause of action under either § 1985 or § 1986. Furthermore, because these county officials are acting in a quasi-judicial capacity of deciding whether or not to prosecute, they are immune from either § 1983 or § 1985 liability. And finally, because no due process violations are sufficiently identified, the § 1983 claims must also fail. For all of the above reasons, the motions to dismiss of the Count IV defendants must also be granted.

VI. MOTIONS FOR SUMMARY JUDGMENT

Both defendant McCracken and Bouma have moved for summary judgment in this case. Based on the above discussion granting all of the defendants' motions to dismiss, it is evident that Bouma's motion for summary judgment must be denied. And since we have granted McCracken's motion to dismiss, his motion for summary judgment is now moot and must also be denied. Since any of Mrs. Ralph Bouma's claims are based upon Ralph Bouma's complaint or cause of action, the above Memorandum Opinion applies to her claims as well.

An appropriate order will issue in accordance with this Memorandum Opinion.

Done and dated this 20th day of April, 1981.

ss: James F. Battin Chief United States District Judge

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT No. 81-3331 D.C. No. CV-80-117-GF MEMORANDUM²

RALPH BOUMA and MRS. RALPH BOUMA, his wife,

Plaintiff | Appellants.

VS.

LARRY C. IVERSON, INC., a Montana Corporation, et al.,

Defendants/Respondents.

Appeal from the United States District Court for the District of Montana James F. Battin, Chief Judge, Presiding Submitted June 9, 1982

Before: HOY, TANG and BOOCHEVER, Circuit Judges.

The Boumas appeal the dismissal with prejudice of their civil rights claims under 42 U.S.C. §§ 1983, 1985 and 1986. We affirm.

The Boumas contend the state courts deprived them of due process: (1) by construing the Montana Corporate Code to require nullification of contracts entered into without strict compliance with that code; and (2) by giving collateral estoppel effect to findings of fact and conclusions of law of former judgments to which the Boumas were allegedly strangers. These arguments are without merit. The assertion that a state court decision is incorrect and contrary to prior state court decisions does not present a question for federal review. The district court properly concluded that no fourteenth amendment violations had

² filed by clerk of court June 21, 1982

been presented. Patterson v. Colorado ex rel. Atty. Gen., 205 U.S. 454, 461 (1907).

The district court correctly concluded that the state judges and county prosecutor are immune from the claims brought against them by the Boumas. The district court's citation and discussion of *Imbler v. Pachtman*, 424, U.S. 409, 431, (1976); *Pierson v. Ray*, 386, U.S. 547 (1967); and *Hall v. Flathead County Attorney*, 478 F. Supp. 644 (D. Mont. 1979), amply support its conclusion.

The Boumas correctly argue that on a Fed. R. Civ. P. 12(b) (6) motion to dismiss for failure to state a claim, the complaint is construed in a light most favorable to the plaintiff, and all factual allegations are assumed to be true. But it is well established that mere conclusory allegations without reference to material facts are insufficient to state a claim under the Civil Rights Act. Ellis v. Cassidy, 625 F.2d 227 (9th Cir. 1980); see also: United States v. City of Philadelphia, 644 F.2d 187, 204 (3rd Cir. 1980); and Cohen v. Illinois Institute of Technology, 581 F.2d 658, 663 (7th Cir.) cert. denied, 439 U.S. 1135 (1979). We have reviewed the record and we agree with the district court that Boumas have stated only conclusory allegations of civil rights violations without reference to material facts. The motion to dismiss was properly granted.

The district court's memorandum opinion adequately disposed of all issues raised and it is hereby affirmed.

AFFIRMED.

AFFIDAVIT OF MAILING AND SERVICE

STATE OF MONTANA, County of Cascade, ss.

RAY F. KOBY, being duly sworn, deposes and says:

- 1. That I am a member of the bar of the Supreme Court of the United States and one of the attorneys of record for the respondent in the within matter.
- 2. That on April &, 1983, I personally deposited in the mail at the United States Post Office in Great Falls, Montana, properly addressed, first class postage prepaid, the original and forty copies of Respondent's Brief in Opposition, (with Appendix) to the clerk of the within entitled court, within the time for filing.
- 3. That at the same time and place I mailed in the same manner three copies of said brief and appendix to Ralph Bouma, P.O. Box 220, Choteau, MT 59422 and three copies to the attorney for Mrs. Ralph Bouma, John Albrecht, P.O. Box 193, Choteau, MT 59422.

ss: RAY F. KOBY

SUBSCRIBED AND SWORN TO before me this 8 day of April, 1983.

GORHAM E. SWANBERG Notary Public for the State of Montana Residing at Great Falls, Montana My Commission expires: 8/11/85

(NOTARIAL SEAL)

NUMBER 82-1625 SUPREME COURT OF THE UNITED STATES OF AMERICA

Office - Supreme Court, U.S. FILED APR 25 1983

ALEXANDER L. STEVAS. CLERK

RALPH BOUMA and MRS. RALPH BOUMA

Petitioners

VS

LARRY C. IVERSON, INC.

Respondent

ON PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF THE STATE OF MONTANA

PETITIONERS' RELPY BRIEF

RALPH BOUMA Attorney Pro Se P.O. Box 220 Choteau, Mt. 59422 Tel: (406) 466-5374

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NUMBER 82-1625 SUPREME COURT OF THE UNITED STATES OF AMERICA

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Respondent

PETITIONERS' RELPY BRIEF

RALPH BOUMA Attorney Pro Se P.O. Box 220 Choteau, Mt. 59422 Tel: (406) 466-5374 JOHN ALBRECHT Attorney for Mrs. Ralph Bouma P.O. Box 193 Choteau, Mt. 59422 Tel: (406) 466-2621

TABLE OF CONTENTS

| | | PAGE |
|----------|--------------------------------|------|
| TABLE OF | AUTHORITIES | iv |
| INTRODUC | 1 | |
| ARGUMENT | 1 | |
| 1. | The first decision of the | 1 |
| | Montana Surpeme Court, | |
| | Appendix B, reported at 639 | |
| | P. 2d 47, was not a "final | |
| | judgment" within the mean- | |
| | ing of Title 28 U.S.C. Section | |
| | 1257. That decision and the | |
| | procedure leading to it may | |
| | be reviewed by the United | |
| | States Supreme Court. | |
| II. | The Petition for a Writ of | 4 |
| | | |

- Certiorari is not barred by res judicata or collateral estoppel.
- III. The payment of the damages award- 6
 ed by the Montana Supreme Court
 does not moot the question of

whether such damages were awared in violation of due process.

- IV. The Petition for a Writ of 8

 Certiorari presents six
 substantial federal questions.

 The Supreme Court could grant
 certiorari on any one of
 them.
 - a. The Buyers were bound 8.

 by a prior court action obtained by fraud to which they

 were not a party. They were

 not allowed to raise this

 defense.
 - b. The Corporation failed 8
 to answer Federal Question
 Number 2.
 - c. The fact that the Buyers 9
 were given a hearing on the
 motion to disqualify Judge
 Langen does not mean the fail-

ure to disqualify him did not violate due process.

- d. The Montana Supreme 9
 Court's deciding this case
 violated due process.
- e. The Montana Supreme 11

 Court denied Ralph Bouma

 due process of law by re
 fusing to allow him to

 argue his case.
- f. The Montana Supreme 15

 Court denied the Buyers due process of law by imposing damages on appeal of \$500.00 without notice or opportunity to be heard.

Conclusion

16

TABLE OF AUTHORITIES

| | PAGE |
|--|------|
| Campanella vs. Bouma (1967) 164 Mont. 217, 520 P.2d 1073 | 13 |
| Country Club Tower Corp vs. Tower Management (D.Mt., 1967) 275 F. Supp. 468 | 5 |
| Cromwell vs. County of Sac (1876) 94 U.S. 351, 24 L. Ed. 195 | 4 |
| Dakota Co. vs. Gliddon (1885) 113 U.S. 222, 28 L. Ed 981, 5 S.Ct. 428 | 7 |
| Department of Banking vs. Pink (1942) 317 U.S. 264, 87 L. Ed 257 | 3 |
| F.T.C. vs. Minneapolis - Honeywell R. Co. (1952) 344 U.S. 206, 97 L. Ed. 245, 73 S. Ct. 245 | 3 |
| Groppi vs. Leslie (1972) 404 U.S. 496, 30 L.Ed2d 632, 92 S.Ct. 582 | 16 |
| Johnson vs. Mississippi (1971) 403 U.S. 212, 29 L.Ed. 2d 423, 91 S. Ct. 1778 | 11 |
| Price vs. Johnston (1948) 334 U.S. 266 | 14 |

| Priser, Comm. vs. Newkick (1975) 422 U.S. 395 | 7 |
|--|----|
| Reynolds vs. State of Georgia (5th Cir., 1981) 640 F. 2d 702 | 5 |
| CONSTITUTIONAL PROVISIONS | |
| 14th Amendment, United States Constitution STATUTES AND RULES | 12 |
| Title 28 U.S.C. Section 1257 | 2 |
| Title 42 U.S.C. Section 1983, 1985, 1986 | 5 |
| Section 37-61-416, Montana Codes Annotated | 12 |
| Rule 8(c), Montana Rules of Civil Procedure and Federal Rules of Civil Procedure | 5 |
| OTHER AUTHORITIES | |
| Cases collected at 29 . Ed 2d at 887, Section 7(a) | 4 |

INTRODUCTION

The facts were outlined in the Petition for a Writ of Certiorari. This brief is in reply to the Respondent's Reply Brief.

Mr. and Mrs. Ralph Bouma are referred to as the "Buyers". Larry C. Iverson, Inc., the Seller under a land exchange contract, is referred to as "the Corporation"

ARGUMENT

I. THE FIRST DECISION OF THE MONTANA SUPREME COURT, APPENDIX B, REPORTED AT 639 P. 2d 47 WAS NOT A "FINAL JUDGMENT" WITHIN THE MEANING OF TITLE 28 U.S.C SECTION 1237. THAT DECISION AND THE PROCEDURE LEADING TO IT MAY BE REVIEWED BY THE UNITED STATES SUPREME COURT.

This case involved two appeals to the Montana Supreme Court. First, the trial court, granted summary judgment to the Sellers on the contract for deed and provided an accounting. Both sides appealed. The Montana Supreme Court reversed for a new accounting. The Trial Court held a hearing and provided a new accounting. The Buyers appealed that decision. The Buyers petition for a writ of certiorari.

If a state appellate court reverses a trial court for a new accounting, then that appellate court decision is not a final judgment, see cases collected at 29 L. Ed 2d at 887, Section 7(a). In this case, the Montana Surpeme Court ordered a new accounting, Appendix B, Petition for Writ of Certiorari, at 89-93. The first appellate decision was not a final judgment.

The Corporation argues that the Buyers started to seek a Writ of Certiorari by asking Justice Rehnquist for a stay in the first appeal. The stay was denied. The Buyers discontinued their attempt to obtain a writ of certiorari when Judge Langen issued the new accounting. It was an appealable order under Montana State Rules; it would be followed by a final judgment of the Montana Supreme Court.

The Corporation cites no cases that hold that when a state appellate court orders an accounting that that decision is "final" within the meaning of Title 28 U.S.C. Section 1257

so as to preclude review of errors made prior to that decision. In both F.T.C. vs. Minneapolis -Honeywell R. Co. (1952) 344 U.S. 206, 97

L. Ed. 245, 73 S. Ct. 245 and Department of
Banking vs. Pink (1942) 317 U.S. 264, 87 L. Ed

257 the Court held that a post - judgment motion was not a motion for a rehearing which would extend the time for a petition for writ of

Certiorari. Neither was a decision where a state appellate court reversed a lower court for an accounting.

Further, there is a strong policy reason not to hold this petition to be untimely. The Corporation suggests that the first decision was subject to a petition for writ of certiorari. The prevailing case law says it was not. There was no way the Petitioners knew if it was or not, except by petitioning. The result would be two petitions for a writ of certiorari for one case. This would create additional work for an already over burdened Court.

The better procedure would be to exhaust all state appeals. This would be by holding the accounting and appealing that decision.

This would result in one petition for a writ of certiorari on the case.

In summary, the first decision of the Montana Supreme Court was not final. This is because an accounting was ordered. All errors in this case may be reviewed by this petition for a writ of certiorari.

II. THE PETITION FOR A WRIT OF CERTIORARI IS NOT BARRED BY RES JUDICATA OR COLLATERAL ESTOPPEL.

The Corporation argues that the Buyers brought a Civil Rights action based upon Title 42 U.S.C. Sections 1983, 1985 and 1986. Since that action was dismissed, all the Buyers due process claims are barred by collateral estoppel or res judicata. It cites no cases or other authority for this assertion (Respondent's Brief in Opposition at 11-12).

Res judicata is a bar only if the same claim is brought a second time, Crowell vs.

County of Sac (1876) 94 U.S. 351, 24 L. Ed.

195. In this case, the Corporation brought a civil action to void a contract for deed. The Buyers alleged defenses which included due process violations. Eventually, the Buyers brought a civil rights action under Title 42 U.S.C. Sections 1983, 1985 and 1986. They claimed that the procedural violations amounted to actionable conduct under those section.

The 9th Circuit Court of Appeals disagreed,
Appendix B, Respondent's Brief in Opposition.

Effectively, it held that such violations did
not state a cause of action under the Civil

Rights Act. Such violations may be reviewed by
the United States Supreme Court by a Petition
for a Writ of Certiorari, Reynolds vs. State
of Georgia (5th Cir., 1981) 640 F. 2d 702;
County Club Tower Corp. vs. Tower Management
(D. Mont., 1967) 275 F. Supp. 468.

Furthermore, the Corporation never raised the defenses of collateral estoppel or res judicata. Such theories are affirmative defenses which must be pleaded or are waived, Rule 8(c). Montana Rules of Civil Procedure and Federal Rules of Civil Procedure. Since these arguments were not raised before, they have been waived.

In summary, the Corporation cites no authority for its argument that the Buyers Petition is barred by collateral estoppel and res judicata. Since the causes of action in the state civil action and the federal civil rights action were not the same, the Petition is not barred. The Corporation failed to raise these arguments earlier so they are waived.

III. THE PAYMENT OF THE DAMAGES AWARDED BY THE MONTANA SUPREME COURT DOES NOT MOOT THE QUESTION OF WHETHER SUCH DAMAGES WERE AWARDED IN VIOLATION OF DUE PROCESS.

The Montana Supreme Court awarded the Corporation \$500.00 in damages on appeal. This was done without any notice or opportunity to be heard. They Buyers asked the Montana Supreme Court and the United States Supreme Court for a stay of this order. The stay was denied. The Buyers paid the award.

The Corporation argues that the award of

\$500.00 is moot. This is because it has been paid.

"There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if refersed can recover back his money." Dakota Co. vs. Glidden (1885) 113 U.S. 222, 224, 28 L. Ed. 981, 982, 5 S.Ct. 428. The payment of the damage award by the Buyers does not moot the issue of whether the award violated due process.

The Corporation cites Priser, Comm. vs.

Newkick (1975) 422 U.S. 395. In that case, a prisoner was transferred from a medium security prison to a higher security prison without notice or hearing. He brought a civil action for injunctive and declaratory relief. Before a final decision was reached the prisoner was transferred to a minimum security prison. The Supreme Court held the case to be moot.

<u>Priser</u> did not involve the payment of damages after judgment but before an appeal was decided. It is not on point.

The issue of whether damages on appeal were awarded in violation of due process is not moot. The Supreme Court may review this issue.

IV. THE PETITION FOR A WRIT OF CERTIORARI PRESENTS SIX SUBSTANTIAL INDEPENDENT FEDERAL QUESTIONS. THE SUPREME COURT COULD GRANT CERTIORARI ON ANY ONE OF THEM.

a. THE BUYERS WREE BOUND BY A PRIOR COURT ACTION OBTAINED BY FRAUD TO WHICH THEY WERE NOT A PARTY. THEY WERE NOT ALLOWED TO RAISE THIS DEFENSE.

The Corporation argues that the Buyers were not bound by a court decision in which they had a legitimate interest. This is not correct.

The Buyers were bound by part of the decision in <u>United Bank of Pueblo vs. Iverson</u> consolidated with <u>Farmers State Bank of Conrad vs. Iverson</u> Numbered 8221/8073, Appendix F. This was specifically stated by the Montana Supreme Court in its opinion, Appendix B at 56, 61, and 73. If the Buyers were bound by that decision to certain findings, then they had an interest in the case. They were not a party to that case.

b. THE CORPORATION FAILED TO ANSWER FEDERAL QUESTION NUMBER 2.

The Corporation made no argument as federal question number 2. This argument is unrefuted.

c. THE FACT THAT THE BUYERS WERE GIVEN A HEARING ON THE MOTION TO DISQUALIFTY JUDGE LANGEN DOES NOT MEAN THE FAILURE TO DISQUALIFY HIM DID NOT VIOLATE DUE PROCESS.

The Corporation argues that a hearing was held on the disqualification of Judge Langen. For this reason, the failure to disqualify him did not violate due process.

The reasons for disqualifying Judge Langen are stated in the Petition for a Writ of Certiorari at 35-40. The reasons are not that a hearing was not held. The reasons are that Judge Langen was so biased and prejudiced that due process was violated if he remained on the case. This argument is unanswered by the Corporation.

d. THE MONTANA SUPREME COURT'S DE-CIDING THIS CASE VIOLATED DUE PROCESS.

The Corporation argues that Ralph Bouma's affidavit seeking a grand jury and the Buyers' Civil Rights Complaint were voluntary acts. For this reason, they could not be the basis of dis-

qualifying the Montana Supreme Court.

In this case, Ralph Bouma sought to keep the grand jury affidavit secret. This is required by state law, Section 46-11-317, Montana Codes Annotated. Despite this attempt, the affidavit was made public.

The cases cited by the Corporation are not on point (see Brief in Opposition at 15). They do not involve a person who tried to keep secret an application for the impaneling of a grand jury. Ralph Bouma tried to have the Montana Supreme Court Justices remain unbiased. His efforts were unsuccessful.

Furthermore, the Corporation used Ralph Bouma's grand jury affidavit at oral argument, Appendix J, at 243 - 245. The affidavit was completely irrelevant to the validity of a land exchange contract. Yet, the attorneys for the Corporation were allowed to incense and emotionalize the court be referring to it during oral argument.

In this case, the Justices of the Supreme Court were named in a federal law suit brought

by the Buyers. This fact is stated in their opinion, Appendix B at 52. The justices were obviously influenced by this fact.

Johnson vs. Mississippi (1971) 403 U.S. 212 29 L. Ed 2d 423, 91 S.Ct. 1778 prevents judges who are enmeshed with a party from sitting on a case. The justices of the Montana Supreme Court were so enmeshed they should have been disqualified from the proceeding. Their judgments 639 P. 2d 47 (Appendix B) and Appendix D should be vacated for this reason.

e. THE MONTANA SUPREME COURT DENIED RALPH BOUMA DUE PROCESS OF LAW BY RE-FUSING TO ALLOW HIM TO ARGUE HIS CASE.

The Corporation argues that the right to self-representation in civil matters has never been established under federal constitutional law by the United States Supreme Court. This is true. Three federal circuit courts of appeals have recognized it (see cases, Petition for Writ of Certiorari at 44). Only in Montana is there no such right.

To end this disagreement between the Montana Supreme Court and the federal courts of appeal the United States Supreme Court should accept certiorari. This case clearly presents the chance to extend the right of self-representation in civil matters in state courts under the 14th Amendment's due process clause.

The Corporation argues that a person has no right to oral argument. This is true but is not the issue. The issue is whether one party may be allowed oral argument because it is represented by an attorney while the other party is denied oral argument because he does not have an attorney.

This is a violation of the 14th Amendment's due process clause. Also, it violates the 14th Amendment's equal protection clause. Section 37-61-416, Montana Codes Annotated, states, "A party to a civil action who is of full age may ... defend the same in person..." To allow Ralph Bouma to defend his case before the trial court but not in the Montana Supreme Court violates the equal protection clause of the 14th Amendment.

Furthermore, the Montana Supreme Court had

told Ralph Bouma that he would have to argue his case without his wife's attorney. In Campanella vs. Bouma (1967) 164 Mont. 217, 520 P. 2d 1073, the Montana Supreme Court quoted, approvingly, language from the trial court. It said, "In the future, counsel for Mrs. Bouma will not be permitted to argue or otherwise participate in instances where she has no more than a tangential interest and Mr. Bouma has the direct interest." 520 P. 2d at 1075. Without any notice, the Montana Supreme Court reversed itself and refused to allow Mr. Bouma to be heard.

The Corporation argues that Ralph Bouma was not prejudiced by requiring Gustafson to argue his case. This is not true. Gustafson came to oral argument prepared only to argue the case for his client, Mrs. Ralph Bouma. Gustafson's ineffectiveness was demonstrated in Appendix J at 243. On that page, Justice Morrison is quoted as saying, "Now, Mr. Gustafson, what has all this got to do with the issues before the court."

Finally, the Corporation argues that a prisoner representing himself has no right to appear at oral argument, Price vs. Johnston
(1948) 334 U.S. 266. In Price, the court was concerned with disruption of the prison system. In this case, Ralph Bouma was not an inmate of a prison. There would be no disruption. Further, the Court in Price did not say a prisoner may be denied oral argument while the state is allowed it. Price is not on point.

In summary, this case clearly presents to the United States Supreme Court the question of whether the due process clause extends to persons in civil cases the right to self-representation. Also, the question of whether the equal protection clause requires a person representing himself all the procedural rights of a person represented by counsel is presented. These are important federal questions where the Montana Supreme Court conflicts with several federal circuit courts of appeal. The United States Supreme Court should accept certiorari to decide these issues.

f. THE MONTANA SUPREME COURT DENIED THE BUYERS DUE PROCESS OF LAW BY IMPOSING DAMAGES ON APPEAL OF \$500.00 WITHOUT NOTICE OR OPPORTUNITY TO BE HEARD.

The Montana Supreme Court imposed damages of \$500.00 against the Buyers on appeal. The Corporation did not ask for this relief. The Montana Supreme Court did not say that they were considering such relief.

The Corporation argues that the Buyers were given notice by Rule 32, Montana Rules of Appellate Civil Procedure. This rule does provide for damages on appeal. But, having a rule to provides for damages does not eliminate the need for notice of invoking a rule. If this was the case, a person would not be required to give notice in civil actions. The existence of a statute would be adequate for recovery. The Corporation's argument is so untenable that it cites no quthoity for its position.

In summary, an important federal question is presented for review. It is whether a State Appellate Court denies due process by imposing damages on appeal without any notice or

opportunity to be heard. The purpose of such notice would be to give Boumas a chance to present mitigating circumstances, Groppi vs.

Leslie (1972) 404 U.S. 496, 30 L. Ed 2d 632, 92 S. Ct. 582. The Supreme Court should grant a writ of certiorari in this case.

CONCLUSION

The first decision of the Montana Supreme
Court affirmed the trial court and reversed in
part ordering an accounting. It was not a final
judgment or decree. As such, it was not reviewable by the United States Supreme Court.

Further, the questions for review are not barred by res judicata or collateral estoppel. The Corporation cites no authority for this position. The Corporation did not raise this argument in any state court.

In addition, the payment of damages on appeal does not moot the question of whether the award of damages without notice or hearing violates due process. The Corporation cites no authority for this position.

Finally, the Corporation has not substantially refuted any of the six federal questions presented for review. The Court should grant the writ of certiorari on all or any of the federal questions raised.

Respectfully submitted.

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CERTIFICATE OF MAILING

We certify that on April <u>J2</u>, 1983, that three copies of the Petitioners' Reply Brief

were mailed

postage prepaid to:

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Dated: April 22, 1983.

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